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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-897

HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware Corporation,

Petitioners,

vs.

THE VENDO COMPANY, a Missouri Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners pray that a writ of certiorari be issued to review the judgments of the Supreme Court of Illinois entered September 27, 1974, as amended on denial of rehearing on November 27, 1974.*

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* Italics ours unless otherwise noted herein.
NOTE: "App." denotes appendix. The pages of each appendix, except B, E and F, which are the three upper court opinions, are numbered as follows: "A1", "A2", etc. and "D1", "D2", etc. Appendices B, E and F adopt the page numbers of the official reports, e.g., "B261", "B262", etc.
References to the record refer either to the two volume abstract (*e.g.*, "A. 15-19") or to the two books of exhibits (*e.g.*, "PX 114" or "DX 201"). Volume I of the abstract comprises pages 1-625; Volume II, pages 627-1225. Volume I of the Book of Exhibits comprises PX 1A-PX 79 and DX 1-DX 33; and Volume II, PX 101-PX 135 and DX 201-DX 304.

OPINIONS BELOW

This case was tried twice. There are two trial court opinions, two Appellate Court opinions, and one Supreme Court opinion. The first trial court opinion and judgment is unreported and is printed in Appendix A. The first Appellate Court opinion is reported at 105 Ill.App. 2d 261, 245 N.E. 2d 263 (2d Dist. 1969) and is printed in Appendix B. The Order of the Supreme Court denying The Vendo Company leave to appeal is unreported and is printed in Appendix C. The second opinion and judgment of the trial court is unreported and is printed in Appendix D. The second Appellate Court opinion is reported at 13 Ill.App. 3d 291, 300 N.E. 2d 632 (2d Dist. 1973), and is printed in Appendix E. The final opinion of the Illinois Supreme Court is reported at 58 Ill. 2d 289, ... N.E. 2d ..... (1974), and is printed in Appendix F.

JURISDICTION

The opinion of the Supreme Court of Illinois was initially filed on September 27, 1974. Petitioners' petition for rehearing was denied and the opinion modified on November 27, 1974, App. H.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

I.

Whether the Supreme Court of Illinois, after denying leave to appeal from an Appellate Court judgment which adjudged liability and fixed the law of the case upon which to measure damages at retrial, denied petitioners procedural due process by retroactively changing the law of the case governing the measure of damages at the retrial and, further, by predicating petitioners' liability on a new theory never tried and unsupported by the pleadings.

II.

Whether the Supreme Court of Illinois arbitrarily and capriciously denied petitioners defenses in bar of the action brought by respondent Vendo and a right of action against respondent Vendo, both guaranteed by the Illinois State Antitrust Acts, and whether such denial deprived petitioners of substantive due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

III.

Whether there is any evidence in the record that rationally justifies the conclusions and judgment of the Supreme Court of Illinois that respondent Vendo sustained $7,345,500.00 in damages by reason of the conduct of Petitioner Stoner; and whether by reason of the absence of such evidence, Petitioners have been denied Due Process, contrary to the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI and Amendment XIV of the Constitution of the United States, the Illinois Antitrust Act of 1965, Illinois Revised Statutes, 1971, Chapter 38, Sec. 60-1, *et seq.*, and the Illinois Antitrust Act of 1891, Illinois Revised Statutes, 1963, Chapter 121½, Secs. 301, 305, are set forth in Appendix J.

STATEMENT OF THE CASE

On April 3, 1959, Vendo Company ("Vendo") and Stoner Investments (known then as Stoner Manufacturing Company) entered into an agreement under which Vendo agreed to purchase substantially all of Stoner Investments' assets. Stoner was the president and controlling owner of Stoner Investments, which then manufactured candy vending machines. Vendo, in 1959, was the leading manufacturer of vending machines in the world.

Vendo simultaneously executed a five year employment contract with Stoner, which prohibited Stoner from engaging in the vending machine manufacturing business in any territory in which Vendo was so engaged for the 5 year period of his employment and for 5 years thereafter. The sales agreement contained a similar ten-year covenant not to compete, applicable to Stoner Investments (PX 1A, A. 363; App. B 266-68).

On August 10, 1965, Vendo filed suit against petitioners claiming damages in the amount of $500,000 for breach

of the non-competition covenants. Count I of said complaint, which applied to Stoner, averred that he:

> "violated and breached his duties and obligations" under his employment contract by "directly and indirectly (entering) into the vending machine manufacturing business individually, as a *partner, officer, stockholder, or joint venturer" in Lektro-Vend;*
>
> and
>
> "during the term of his employment, and thereafter, through the provision of financing, advice and use of facilities, *entered into the vending machine manufacturing business with Lektro-Vend Corp.*"
>
> and
>
> "That the aforesaid corporation engages *in the manufacture of vending machines in competition with the plaintiff,* and in territories in which (Vendo) or its subsidiaries or affiliates have been, or are, conducting business at all times material herein" (A. 4, 43-44).

Count II, as amended, charged Stoner Investments with violations of the sales contract, in that it

> "has indirectly engaged and participated in the ownership, management, operation and control of the business of the manufacture and sale of vending machines by consenting to and actively permitting its facilities, officers, agents and employees to be used by said *Lektro-Vend Corp. in the sale and manufacturing of vending machines in competition with the plaintiff, The Vendo Company;* that the defendant, Stoner Investments, Inc., in violation of its contractual obligations, managed, operated, controlled and participated in the ownership, management, operation and control of *the Lektro-Vend Corp.,* a foreign corporation, *by the provision of financing, advice and the use of facilities afforded the aforesaid Lektro-Vend Corp*" (A. 44-45).

On January 28, 1966, Vendo amended its complaint, charging that both petitioners stole valuable trade secrets of Vendo, including the design for certain vending machines which they appropriated for their own use and for

the use of Lektro-Vend and prayed damages of $1,500,000 (A. 43, 57).

Petitioners raised affirmative defenses, alleging that the covenants not to compete violated the Illinois Antitrust Act of 1891 (Ill. Rev. Stat., Ch. 121½, §301 et seq.) and that they were unenforceable under the terms of the 1965 Illinois Antitrust Act (Ill. Rev. Stat., Ch. 38, §60-1 et seq.) (A. 13-15). Petitioners also counterclaimed under the Illinois antitrust laws, alleging that Vendo spread false rumors regarding the financial status of the Lektro-Vend Corp., and its capability to perform its contracts for the manufacture and servicing of vending machines and engaged in other unlawful *intrastate* trade interference and unfair competition. Petitioners further charged that the covenants not to compete which Vendo sued on were unlawful and that the attempt to enforce them was an attempt by Vendo to establish monopoly power and to exclude competition in violation of the 1965 Act (A. 15-19). The trial court struck the defenses and counterclaim (A. 70-1).

The First Trial.

After a bench trial, the court entered judgment against Stoner for $250,000 as damages for breach of his covenant not to compete and against petitioners jointly for $1,100,000 as damages for appropriation of a trade secret (App. A).

The First Appeal (App. B).

The Appellate Court reversed the $1,100,000 judgment holding that Vendo never had a trade secret, let alone that Stoner stole one (App. B 278-81, 287-88). The court, however, held that petitioners breached their respective covenants not to compete, despite petitioners' contentions that the covenants were unreasonable in time (ten years) and

in territory (over fifty countries) and were thus unenforceable. Petitioners also argued the conduct complained of was lawful under the terms of the covenants (App. B 281-7).

Although finding liability for breach of the covenants, the court held that Vendo had failed to prove damages by reason of petitioners' wrongful competition through the instrumentality of Lektro-Vend in violation of their covenants not to compete (App. B 278-81, 291, 299). The court stated (App. B 291):

> "Vendo should be permitted to recover an amount equal to the net profits it lost and might reasonably be expected to lose, plus the amount by which the value of its business will have been diminished as of June 1, 1969, because of defendants' wrongful competition.
>
> "On remand, the trial court should determine the extent of these damages."

The court also reversed the $250,000 judgment against Stoner, instructing that his salary should be forfeited only for the period he breached the covenants. (App. B 288-90).

The court affirmed the striking of petitioners' affirmative defenses and counterclaim brought under the Illinois antitrust laws on the ground that interstate commerce was involved and that the Illinois Acts were accordingly preempted by federal antitrust laws (App. B 297-99). Vendo's petition for leave to appeal to the Illinois Supreme Court was denied (App. C).

The Second Trial.

Before the retrial, petitioners moved to reinstate their separate defenses and counterclaim, relying on an amendment to the 1965 Act which was intended to cure the preemption problem (A. 632). The court denied their motion (A. 650).

Vendo's sole amendment to the complaint was to increase the ad damnum (A. 635, 651-2). In his opening statement, Vendo's counsel announced that its damages should be measured by "what Vendo lost by way of sales by not having this machine [the Lektro-Vend] if that resulted from the conduct of Mr. Stoner" (A. 729). But not only did Vendo make no effort to prove damages resulting from the "wrongful competition" of petitioners as alleged in the complaint and directed by the Appellate Court's mandate, which was the law of the case* (A. 877-927, 825-31; App. E 293-94; see *infra*, pp. 19-20), it completely ignored the Lektro-Vend machine (*infra*, pp. 27-8).

At the conclusion of the retrial, the court entered judgments against Stoner for $170,835 and against petitioners for $7,345,500 (App. D).

The Second Appeal (App. E).

On appeal for the second time, the Appellate Court stated (App. E 293-294):

> "At the trial on remand Vendo made no attempt to prove lost profits caused by defendants' 'wrongful competition'. Instead, it relied principally on the testimony of two experts, both of whom acknowledged that *their theory for the computation of damages was loss of sales from the absence of a FIFO machine and that Stoner was responsible for Vendo's lack of such machine.* These experts relied substantially on a report made by Vendo's manager of business research making estimates of percentage of the confection vendor market taken over by FIFO vendors as distinguished from the older drop-shelf type. This very report warned that it did not include a sufficient number of operators

* Petitioners objected throughout the trial to the evidence adduced upon Vendo's theory (A. 735-36, 758-62, 766-68, 772, 833-53, 867-74, 987-89) and moved to strike the evidence of plaintiff's experts based upon the theory (A. 1047).

> to make a determination, and that therefore 'inferences concerning competitive positions within the total market should be avoided.' *The figures of both experts on lost profits and on diminution of the value of the business were premised on Vendo's failure to have FIFO, and on Stoner's responsibility for such failure.*"
>
> • • •
>
> "Vendo's failure to have a FIFO vending machine is not attributable to defendants. The computation of damages for a loss of profits during defendants' breach and the diminution in the value of its business was not based on defendants' 'wrongful competition', and therefore did not conform to the decision and mandate of this court."

The $7,345,500 judgment against petitioners was reversed and the cause remanded (App. E 296) to give Vendo a third chance to prove the allegations of its original complaint, *supra* p. 5. The judgment against Stoner, representing forfeiture of salary, was affirmed.

The Court further affirmed the refusal of the trial court to reinstate the defenses and counterclaim under the Illinois antitrust laws, holding that it was bound by the law of the case (App. E 295).

The Appeal to the Illinois Supreme Court (App. F).

Both Vendo and petitioners were granted leave to appeal to the Illinois Supreme Court, which reversed the judgment of the Appellate Court and affirmed that of the trial court.

The Illinois Supreme Court predicated petitioners' liability on breach of fiduciary duty and diversion of a corporate opportunity (App. F 304-05). That Court concluded that Stoner nurtured the Lektro-Vend, failed to disclose to Vendo his financial involvement in the Lektro-Vend and misled Vendo while acting as Vendo's agent to acquire the Lektro-Vend. Stoner's actions left open the question

"(w)hether Phillips might have been willing to sell at a lower figure acceptable to (Vendo) . . ." (App. F 304)* This theory of liability was first raised in the Supreme Court.**

The court rejected petitioners' contentions that Vendo impermissibly changed the theory of its case, stating that "the acts of defendants in misappropriating the Lektro-Vend and their use of it to compete against plaintiff are intertwined, the latter being, *so to speak*, the means by which the former was brought to bear against plaintiff" (App. F 306-07).***

The court further discarded petitioners' objections that Vendo failed to prove damages as directed by the mandate of the Appellate Court on remand, holding that it was not bound by the law of the case as set by the Appellate Court. The Court affirmed the $7,345,500 damage award as being the "difference between the profits which it (Vendo) could reasonably by expected to make if it had been the owner of the Lektro-Vend and the profits which it did in fact earn from the sale of candy-vending machines" (App. F. 310). *The court thus retroactively changed the law of the case which governed the trial after denying leave to appeal from the judgment which fixed that law* (App. C).

---

* Vendo negotiated for the purchase of the Lektro-Vend itself. It sent its final offer to purchase the Lektro-Vend directly to the Phillipses. The Illinois Supreme Court's holding that Stoner diverted the Lektro-Vend is totally unwarranted (see *infra* pp. 24-7).

** Vendo first raised a breach of fiduciary duty theory on a petition for rehearing in the Appellate Court on the second appeal (Case No. 71-396, Pet. p. 12-14) and first mentioned diversion of corporate opportunity in the Illinois Supreme Court.

***But incurring liability through the wrongful competition of Lektro-Vend Corp., as the complaint alleged (*supra*, p. 5), and incurring liability for damages for misappropriating the Lektro-Vend machine are horses of a different color (see *infra*, pp. 19-20).

The court further affirmed the striking of petitioners' counterclaim brought under the Illinois antitrust laws, stating that "the Illinois Act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by (petitioners)" (App. F 310). The court did not pass on the striking of petitioners' defenses, although that too was at issue.

The Federal Questions.

Each of the federal questions sought to be reviewed here arose for the first time in and as a result of the judgment of the Supreme Court. They were raised by petitioners in their petition for rehearing (App. G 2-13, 16-27, 30-35). Thus the questions are properly raised for review here. *Saunders* v. *Shaw*, 244 U.S. 317, 320; *Missouri* v. *Gehner*, 281 U.S. 313, 320.

Petitioners submit that the decision of the Illinois Supreme Court denies them procedural due process in that it predicates liability on the breach of a fiduciary duty amounting to appropriation of a corporate opportunity outside the pleadings, contrary to the law of the case governing the trial, namely, damages for breach of contract resulting from the wrongful competition of petitioners through the instrumentality of Lektro-Vend Corp. and with respect to which new theory of liability petitioners have never had an opportunity to be heard at a meaningful time and in a meaningful manner. Petitioners raised this in their petition for rehearing (App. G 2-13, 30-33).

Petitioners submit that the decision denies them substantive due process in that it arbitrarily deprives them of available affirmative defenses and a right of action under Illinois antitrust laws. The Supreme Court affirmed the striking of the affirmative defenses and counterclaim

on different grounds than the lower courts and the question of arbitrariness arose for the first time in and as a result of that decision.* Petitioners raised this point in their petition for rehearing (App. G 33-35).

Petitioners also submit herein that there is no evidence in the record which rationally supports the findings of the Illinois Supreme Court (i) that Vendo's failure to have the Lektro-Vend machine was petitioners' fault (ii) that Vendo suffered damages in excess of $7,000,000 by reason of not having the Lektro-Vend; and (iii) that the proximate cause of Vendo's damages was its failure to have the Lektro-Vend. Each of these findings was first made in the Illinois Supreme Court (See *infra*, pp. 23-30), and was contrary to that of the Appellate Court, which was based upon the record. Petitioners challenged the arbitrary findings in their Petition for Rehearing (App. G 16-27).

REASONS FOR GRANTING THE WRIT

The decision of the Illinois Supreme Court raises substantial and important questions with respect to the vitality of the federal guarantee of due process of law in state civil proceedings. After denying leave to appeal from the judgment of the Appellate Court which fixed the law of the case governing the trial, the Illinois Supreme Court retroactively changed that law which concerned *damages only* and affirmed a judgment upon a new theory of *liability* never pleaded or tried, without affording petitioners an

* Petitioners argued throughout that because the trial court held it had no jurisdiction to hear their claims because of Article VI (preemption) they were denied substantive due process because those claims involving only intrastate commerce had not been heard on their merits. (Brief and Argument for Appellants, Harry B. Stoner and Stoner Investments, Inc., pp. 38-40, in the Supreme Court.)

opportunity to be heard and present evidence upon that new theory of *liability.*

The decision of the court below runs squarely counter to the *substance* of this Court's long line of prior decisions under the due process clause, aptly summarized in *Armstrong* v. *Manzo,* 380 U.S. 545, 552, as requiring "the opportunity to be heard *at a meaningful time* and *in a meaningful manner.*" Although petitioners have had two trials, they have never had a trial upon the issue on which the Illinois Supreme Court affirmed this $7,345,500 judgment, namely, the breach of a fiduciary duty amounting to "the appropriation of a business opportunity" (App. F 304, 305).

The decision of the Illinois Supreme Court offends federal due process in ignoring the plain terms of petitioners' state antitrust defenses and counterclaim. The counterclaim alleged that respondent violated the Illinois Antitrust Act of 1965 *after its effective date* (A. 15-19). Despite these plain allegations, the striking of these defenses and counterclaim by the trial court was affirmed by the court below on the ground that the state antitrust statute could not be applied *retroactively,* ignoring the fact that petitioners sought its application *prospectively.* No matter how it is read, the opinion of the Illinois Supreme Court nowhere disposes of these allegations upon their merits or upon any rational ground. Instead, the Illinois Supreme Court ignored those allegations and thus acted arbitrarily and capriciously in clear contravention of federal due process guarantees.

The Illinois Supreme Court's disposition of petitioners' state antitrust defenses and counterclaim displays a serious underlying misconception of the interrelationship between the state and federal antitrust laws of which this Court should take cognizance. The first decision of the Appellate Court affirmed the striking of the defenses and counter-

claim on the ground that "the interstate nature of the parties' businesses renders these state laws inapplicable under the doctrine of federal preemption" (App. B 297). This result was reached despite the plain allegations of the defenses and counterclaim which referred solely to the *intrastate commerce* of Illinois (A. 15-19).

In purporting to dispose of petitioners' defenses and counterclaim upon purely arbitrary grounds, therefore, the Illinois Supreme Court skirted the question (which otherwise it would have been required to decide) whether the states are wholly barred from seeking to apply their local antitrust statutes to the intrastate activities of corporations within their borders, simply because said corporations are also engaged in interstate commerce.

The emasculation of the Illinois antitrust statutes by the Illinois courts warrants this Court's concern, particularly in light of *Gulf Oil Corp.* v. *Copp Paving Co.*, 43 U.S. Law Week 4059 (Dec. 17, 1974), which exempted numerous important intrastate activities from the reach of federal antitrust law unless they had a "substantial impact upon interstate commerce" (40 U.S. Law Week 4064). Were state antitrust statutes ignored or limited by state courts as the Illinois statutes were ignored and limited by the Illinois courts here, a "no man's land" would exist with respect to the regulation of anticompetitive activities within a state.

Petitioners further submit that the Illinois Supreme Court's decision awarding Vendo $7,345,500 in damages on account of petitioners' alleged responsibility for Vendo's failure to have a competitive FIFO vending machine is not rationally supported by any evidence in this case; and, accordingly, that the decision offends federal due process (*Konigsberg* v. *State Bar of California*, 353 U.S. 252, 262), that the decision is arbitrary and capricious and denies fundamental federal constitutional rights.

ARGUMENT

I.

IN AFFIRMING THE TRIAL COURT'S JUDGMENT ON A NEW THEORY OF BREACH OF FIDUCIARY DUTY AND DIVERSION OF A CORPORATE OPPORTUNITY, THE SUPREME COURT DENIED PETITIONERS' PROCEDURAL DUE PROCESS OF LAW

Vendo presented this case on two theories of liability—appropriation of a trade secret and breach of covenants not to compete. Vendo prevailed under each theory in the first trial. On the first appeal, the Appellate Court reversed the trade secret theory, but held that petitioners had breached their respective covenants not to compete. Further proceedings in this case were limited by its mandate *to the issue of damages arising from defendants' wrongful competition through the instrumentality of Lektro-Vend* by reason of their financial and other assistance to it.

On review, the Supreme Court announced a theory of liability completely foreign to these proceedings. The court stated (App. F 303):

> "Quite apart from any liability which may be predicated upon a breach of the covenants against competition contained in the sales agreement and the employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and an officer of plaintiff."

The breach of fiduciary duty was that of "misappropriating the Lektro-Vend," (App. F 307), which petitioners "wrongfully . . . diverted to an outside concern" (App. F 309).

The pleadings never intimated that liability was premised on breach of fiduciary duty and diversion of a corporate

opportunity. Nor was this case ever tried on such a theory. Petitioners had neither notice of such a claim, nor a meaningful opportunity to be heard in defense against such a claim.

Further petitioners have been deprived of a fair and meaningful opportunity to contest the measure of damages awarded in this case. The scope of the second trial, the trial on damages, was molded by the mandate of the appellate court. The mandate which became the law of the case provided that the sole purpose of the retrial was to measure the damages Vendo suffered "because of (petitioners') wrongful competition" (App. B 291). On remand, petitioners were not only entitled to rely on the law of the case but were bound by it.

At the retrial, Vendo sought not to prove damages as directed by the appellate court—those flowing from petitioners' "wrongful competition"—but rather to prove damages allegedly suffered by reason of Vendo's not having a FIFO vending machine, which it blamed on Stoner.*

Both Vendo and the trial court ignored the mandate. The issuer of the mandate so found (App. E 294):

> "Vendo's failure to have a FIFO vending machine is not attributable to defendants. The computation of damages for a loss of profits during defendants' breach and the diminution in the value of its business was not based on defendants' 'wrongful competition' and therefore did not conform to the decision and mandate of this court."

The $7,345,500.00 damage award was accordingly reversed.

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* On remand, a trial court must follow the mandate of an appellate court. *People ex rel Bauer* v. *Henry*, 10 Ill. 2d 324; 139 N.E. 2d 737 (1957); *Berry* v. *Lewis*, 27 Ill. 2d 61, 62-63; 187 N.E. 2d 688 (1963).

The Supreme Court discarded the law of the case, which governed the retrial. It held that Vendo's damages were not those suffered "because of defendants' wrongful competition" but rather were the

> "difference between the profits which it could reasonably be expected to make if it had been the owner of the Lektro-Vend and the profits which it did in fact earn from the sale of candy-vending machines." (App. F 310).

While the Supreme Court is not bound by the Appellate Court's mandate, due process does require that if the Supreme Court recasts the mandate, the petitioners be afforded a *new trial*—a meaningful opportunity to be heard—governed by the mandate as recast. The law of the case cannot in this context be changed retroactively and still afford due process.*

An unbroken line of cases teaches that a fundamental requirement of due process is that of affording notice and a meaningful opportunity to be heard. *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379; *Fuentes* v. *Shevin*, 407 U.S. 67; *Goldberg* v. *Kelly*, 397 U.S. 254; *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U.S. 337. In *Armstrong* v. *Manzo*, 380 U.S. 545, 550 and 552, Mr. Justice Stewart stated:

> "'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane* v.

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* The settled law in Illinois is that if a case is tried under an incorrect theory of law, the appropriate action is to reverse and remand for a new trial. *Iroquois Furnace Company* v. *Wilkin Manufacturing Co.*, 181 Ill. 582, 54 N.E. 987 (1899).

> *Central Hanover Tr. Co.*, 339 U.S. 306 at 313, 94 L. ed. 865, at 872, 70 S.Ct. 652."
>
> . . .
>
> "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394, 58 L.ed. 1363, 1369, 34 S.Ct. 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

The requirements of notice and an opportunity to be heard also embrace a reasonable opportunity to know the claims of the opposing party and to meet them. *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268; *Morgan* v. *United States*, 304 U.S. 18.

Saunders v. *Shaw*, 244 U.S. 317, 319, presented a similar question. There a defendant claimed he was denied due process when the Supreme Court of Louisiana entered judgment against him without his having had a proper opportunity to present his case. Mr. Justice Holmes stated:

> "Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view."

The Court held that due process required that the defendant be afforded an opportunity to present his case at a new trial, even though it noted that a retrial may have been an empty form. The law of the case could not retroactively be changed and still afford a meaningful opportunity to be heard. See also *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673.

As in *Saunders* and *Brinkershoff*, the effect of the judgment of the Illinois Supreme Court is to deprive petitioners of "property without affording (them) at any time an opportunity to be heard in (their) defense" *Brinkerhoff-Faris, supra*, 281 U.S. at 678. The Supreme Court premised

liability on a theory completely foreign to the proceedings of this case. It retroactively changed the law of the case. Petitioners have been denied notice and a meaningful opportunity to be heard on the issues upon which judgment for liability and damages was entered.

The Illinois Supreme Court suggests that Vendo "made its theory quite explicit in the trial on remand" (App. F 307) to justify its finding of liability for breach of fiduciary duty and diversion of a corporate opportunity. The trial on remand was limited to *damages;* the theory of liability had been adjudged by the Appellate Court. To extract a new theory of liability from the record of a trial on *damages* simply boggles the mind.

That Court further defends its judgment on the grounds that it fails to see how petitioners suffered from any change in theory of liability (App. F 307). Due process is not hinged on a showing of prejudice. *Saunders* v. *Shaw*, 244 U.S. 317, 319; *Armstrong* v. *Manzo*, 380 U.S. 545. Petitioners further submit that the prejudice involved here is obvious. The Court rewrote this case to be for breach of fiduciary duty and diversion of a corporate opportunity rather than for breach of covenants not to compete. The prejudice is exemplified by the very fact that the Supreme Court deemed it necessary to ground its judgment on a theory entirely different from that litigated.

The theories of law, the issues, the defenses, and the measure of damages differ vastly under each theory. The manner in which the offer to acquire a corporate opportunity was communicated, good faith, use of corporate assets to acquire the opportunity, financial ability of the corporation to make the acquisition, the degree of disclosure made to the corporation, the action taken by the corporation, the need or interest of the corporation to make the acquisition and the degree of corporate control by the

fiduciary all bear on a breach of fiduciary duty and diversion of corporate opportunity theory.* *Paulman* v. *Kritzer*, 74 Ill. App. 2d 284, 294, 219 N.E. 2d 541 (1966), affirmed 38 Ill. 2d 101, 230 N.E. 2d 262 (1967). Petitioners did not have a meaningful opportunity to litigate these issues.

Entirely different legal and factual issues arose under the covenant not to compete theory of liability on which this case was tried. Petitioners defended, claiming that the covenants were void in that they were unreasonable in time and territory and constituted an illegal restraint of trade, and also defended claiming that the terms of the covenants were not breached. The theories of liability are not, as the court below suggests, "intertwined" (App. F 307).

The Illinois Supreme Court, in admitting that the measure of damages for the different theories is different, reveals that petitioners were prejudiced. It discarded petitioners' objections to the measure of damages stating that the "objections represent no more than a rejection of the underlying theory of liability which we have held is applicable" (App. F 310). The point is that petitioners have never had a meaningful hearing on the new "underlying theory of liability which we have held is applicable."

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* The Illinois Supreme Court noted that the record did not answer questions whether Stoner transmitted Vendo's offer to buy Lektro-Vend on a cost plus profit basis to Phillips (App. F 299), whether Phillips ever had an intention to sell the Lektro-Vend design or was committed to manufacturing it (App. F 299), whether Phillips might have been willing to sell Lektro-Vend at a lower figure acceptable to plaintiff (App. F 299) and whether plaintiff would have declined to offer to purchase Lektro-Vend or seek to develop such a machine itself if Stoner had disclosed his interest. These questions are critical to a breach of fiduciary duty and appropriation of corporate opportunity theory. Evidence was not presented on these issues, however, since it was irrelevant to the issues the case was tried on.

II.

THE ILLINOIS SUPREME COURT ARBITRARILY AND WITHOUT ANY RATIONAL BASIS DISMISSED PETITIONERS' DEFENSES AND COUNTERCLAIM UNDER THE STATE ANTITRUST ACTS AND THEREBY DEPRIVED PETITIONERS OF DUE PROCESS.

Petitioners raised affirmative defenses, alleging that the covenants-not-to-compete upon which Vendo sued violated and were therefore void under the terms of the Illinois Anti-Trust Act of 1891, Ill. Rev. Stat. (1963), Ch. 121½, §§301 et seq.; and that they were unlawful and unenforceable under the 1965 Illinois Antitrust Act, Ill. Rev. Stat. (1973), Ch. 38, Sec. 60-1 *et seq.* (effective July 21, 1965).

Petitioners counterclaimed under the 1965 Act alleging that Vendo spread false rumors regarding the Lektro-Vend Corp. and engaged in other unlawful anticompetitive conduct within the State of Illinois *after* the effective date of the 1965 Act. The counterclaim further alleged that Vendo's attempt to enforce the covenants not to compete was an attempt by Vendo to establish monopoly power and to exclude competition in violation of the 1965 Act (A. 15-19).

The Illinois Supreme Court reviewed the propriety of the lower court's striking the defenses and counterclaim on the grounds of federal preemption. The allegations were thus uncontroverted and were to be taken as true. The Court stated (App. F 310):

> "We prefer to dispose of this issue on another ground, namely that the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants. It is familiar doctrine that statutes will ordinarily not be construed so as to produce retroactive application, absent some clear expression of an intention to do so."

With all deference, this is incredible! The counterclaim alleged anticompetitive acts, apart from the contracts, committed *after* the passage of the 1965 Act. The Court ignored hornbook law that the contracts themselves had a "congenital infirmity" (*Hughes, C.J.* in *Norman* v. *B & O R. Co.*, 294 U.S. 240, 307-08) as they were subject to the control of the legislature in the exercise of its police power. These contracts created no vested right to engage in conduct after the passage of the 1965 Act which that Act made criminal. Further, the Court ignored petitioners' *defenses* that the covenants not to compete were void under the 1891 Act and unenforceable under the 1965 Act.

Further the counterclaim charged that Vendo's attempt to enforce the covenants-not-to-compete was itself an anticompetitive act outlawed by the 1965 Act. Section 60-3(1) makes it unlawful for any person to:

> "Make any contract with, or engage in any combination or conspiracy with, any other person who is, *or but for a prior agreement would be*, a competitor of such person:"

for the purpose of restraining trade in certain respects. The prior agreements do not immunize Vendo from this charge. The words "or but for a prior agreement would be, a competitor" mean that or they mean nothing.

Petitioners' interests in presenting affirmative defenses and pursuing a cause of action are encompassed within the Fourteenth Amendment's protection. Due process protects any significant property interest or substantive right. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972). The right to present every available defense to a claim is fundamental. *Windsor* v. *McVeigh*, 93 U.S. 274. Statutory entitlements are also recognized as protected interests. *Goldberg* v. *Kelly*, 397 U.S. 254, 262.

The effect of the Illinois Supreme Court's judgment is to completely read out of Illinois law, insofar as petition-

ers are concerned, two defenses and a right of action for damages, given them by plain and unambiguous statutes, through a process of metaphysics which, boiled down, is purely and simply arbitrary and capricious. While due process will abide errors of law and incorrect decisions, it will not abide a State Court construing a state statute where, as here, it "amounts to mere arbitrary or capricious exercise of power or is in clear conflict with the fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights" (16 Am. Jur.2d, *Constitutional Law*, Sec. 553, p. 957; *Truax* v. *Corrigan*, 257 U.S. 312, 332; *Wood* v. *Conneaut Lake Park, Inc.*, 386 F.2d 121, 124 (3d Cir. 1967); *Rudder* v. *United States*, 226 F.2d 51, 53 (D.C. Cir. 1955)).

Petitioners submit that they were stripped of substantive rights by the Supreme Court, not by an erroneous ruling, but by a ruling which arbitrarily ignored these rights.

III.

THE FINDINGS OF THE SUPREME COURT OF ILLINOIS THAT VENDO'S FAILURE TO HAVE THE LEKTRO-VEND MACHINE WAS STONER'S FAULT AND THAT VENDO SUFFERED $7,345,500 IN DAMAGES BY REASON THEREOF ARE ARBITRARY, ARE NOT RATIONALLY SUPPORTED BY THE RECORD AND DEPRIVE PETITIONERS OF DUE PROCESS.

The Illinois Supreme Court found: (i) that Vendo's failure to have the Lektro-Vend machine was petitioners' fault; (ii) that the proximate cause of Vendo's damages was its failure to have the said machine; and (iii) that Vendo suffered $7,345,500 in damages by reason thereof. A renewed search for the golden bough would be more successful than a search of the record here for evidence which rationally justifies these findings.

This Court has recognized that due process is denied where "(t)here is no evidence in the record which rationally justifies a finding . . ." of a state supreme court. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 247; *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 262; *Thompson* v. *City of Louisville,* 362 U.S. 199, 206.

(A) No Evidence In The Record Rationally Justifies The Finding That Vendo's Failure To Have The Lektro-Vend Machine Was Petitioner's Fault.

The Lektro-Vend machine was designed and produced by the Phillipses. Vendo's officers and directors examined the machine at a trade show in October, 1962 and at that time discussed the possibility of purchasing it with Phillips (A. 196, 217, 305, 395; App. B 273). In December, 1962, Stoner formally requested to be released from his employment contract so that he could invest and participate in the manufacture of said machine. His request was denied (A. 153-6, 174, 191-2, 198, 369-70; App. B 273-4).

In December of 1962, Stoner informed Vendo that Phillips was willing to sell the machine (A. 210, 932-3; PX 27, 28; App. B 274). At Vendo's request, Stoner arranged a meeting in January, 1963 between Phillips and several of Vendo's officers at which the Lektro-Vend machine was demonstrated. The asking price was $1,500,000 (App. B 274; DX 12). Stoner took no active role in the negotiations which ensued. Vendo's President negotiated on behalf of Vendo, and he testified that Stoner acted only "as an intermediary" (A. 219, See also DX 12, p. 3; A. 197).

Stoner advised Vendo to buy the machine at the asking price, believing Vendo "could make money at that price" (A. 151, 932; PX 32). Vendo's Board Chairman "didn't think it was worth anything near that" (A. 197). Vendo's Research and Design Vice President objected to its projected high cost of manufacture and projected high selling

price (DX 11, DX 11A, DX 12, DX 13; A. 306-09). Vendo's Sales Vice President testified that he recommended against acquiring the Lektro-Vend machine because of its high cost of manufacture (A. 1127).

On March 28, 1963, Stoner wrote Vendo's president:

> "Rod Phillips has been inquiring with regards to Vendo's interest in his vending machine. I have advised him that, inasmuch as he had not heard from you, and that I had heard nothing further from you, that I felt that sufficient time had passed so that he could be relinquished of his promise to give Vendo first chance for acquiring it. *I think that the future will show that this represents a serious mistake on your part . . .*" (PX 32).

Vendo's president responded in a letter addressed to Stoner (*"cc: Mr. Rod Phillips"*) that Vendo would pay Phillips his costs plus a fair profit for the machine "but that it was my feeling that this wouldn't add up to anything like $1,500,000" (PX 31). This concluded Vendo's negotiations for the Lektro-Vend.

The record is clear. Vendo had every opportunity to acquire the Lektro-Vend machine. Vendo examined it and negotiated for it. Stoner told Vendo unequivocally that he thought Vendo should buy the Lektro-Vend and that Vendo could make money at the asking price. Stoner's last word to Vendo on its decision not to buy the Lektro-Vend was *"I think that the future will show that this represents a serious mistake on your part"* (PX 32). The Illinois Supreme Court does not mention these last words of Stoner.

Instead it postulates that had Stoner disclosed his interest in the Lektro-Vend machine, Vendo may have dealt with Phillips "directly or through some other agent" (App. F 304). Vendo's president admitted that he, not Stoner, handled the negotiations. The Supreme Court concluded that the record does not indicate whether Vendo's counter-

offer to purchase the Lektro-Vend at cost plus a fair profit was transmitted to Phillips (App. F 299) *even though the "counteroffer" stated "cc: Mr. Rod Phillips"* (PX 31); that the record "casts some doubt" on whether Phillips seriously entertained any intention of selling the Lektro-Vend (App. F 299); that it is "unknown" whether Phillips might have been willing to sell the machine at a lower figure (App. F 304); the Court "cannot say that [Vendo] would have declined an offer to purchase the Lektro-Vend ... or to seek to develop such a machine itself had a genuine opportunity to do so been extended to it" (App. F 306). By such pure speculation and conjecture the Supreme Court concludes that Vendo would have had the Lektro-Vend but for the actions of Stoner;—scarcely proof in a court of law (9 *Wright & Miller, Federal Practice & Procedure*, §2528, p. 569 N. 19).

But the plain unvarnished facts are that Vendo seriously questioned the economic advantages of a FIFO vending machine, and repeatedly decided against its development,—not that "no genuine opportunity had been extended to it" to purchase the Lektro-Vend machine or to develop a FIFO of its own. Vendo's Vice President for Marketing Services testified, "We at Vendo had questions in our mind *in 1963* as to the real need for FIFO" (A. 1065). Within one year of the Lektro-Vend proposition, which it declined, Vendo considered and rejected two proposals to design a FIFO machine (DX 232, DX 14, DX 15, A. 948-49, 1056-68, DX 301, DX 227). Between 1959 and 1969 Vendo considered and rejected eight FIFO proposals and opportunities. *See DX 227 where Vendo tells the tale in its own words!*

Not even Vendo blamed Stoner for its failure to have the Lektro-Vend machine. Vendo admitted that it "had no interest in Lektro-Vend" (A. 780). The Appellate Court, in concluding that "Vendo's failure to have a FIFO vending

machine is not attributable to defendants," pointed out that neither the evidence in the first trial nor in the second trial established that Stoner was responsible for Vendo's failure to have FIFO. It referred to its prior opinion, describing Vendo's unsuccessful efforts to build a FIFO in 1959-1960; that Vendo had decided against developing a FIFO twice before Stoner's recommendation in March of 1963 and that after 1963 Vendo continued to reject the development of the FIFO *even after repeated urging by its salesmen* (App. E 293-4). All of this is supported by solid evidence in the record coming from Vendo.

(B) There Is No Evidence In The Record To Support An Award Of Damages Suffered By Vendo Because It Lacked The Lektro-Vend Machine.

The Supreme Court affirmed the $7,345,500 damage award being "the profits" Vendo lost "which it could reasonably be expected to make *if it had been the owner of the Lektro-Vend*" machine (App. F 310; See also 312). The record, however, does not contain even a *guess* of the amount of such losses. Vendo's principal expert at the retrial was asked on cross-examination:

> "Q. Mr. Nicholson, isn't it correct that the substance of your theory for damages in this case is . . . loss of sales resulting from the absence of [a] FIFO machine; and, as the second step, that Harry Stoner is at fault for the absence of such a machine from Vendo's line in some way?
>
> "A. That certainly is the substance of my reasoning, Mr. Sheridan." (A. 911).

Nicholson's theory of damages was imbedded in the premise that the damages Vendo suffered were those caused by reason of its not having *an imaginary competitive FIFO vending machine* in its product line. (A. 902, 905-927, 877-

881, 885-886, 890, 829-831, 896-897, 900). His damage computations flow from this premise (See PX 129). Vendo's second expert adopted the same premise (A. 990-97, 1008-1009, PX 131, 132, 133). The evidence on damages thus related *solely* to amounts Vendo claimed it lost because it lacked an imaginary competitive FIFO vending machine, *not the Lektro-Vend machine.*

The damages suffered by Vendo because it lacked an *imaginary competitive FIFO vending machine* differ radically from those it might have suffered because it lacked the *Lektro-Vend.* Lektro-Vend's sales were only two to three percent of industry sales, according to Vendo's own figures (PX 203, p. 4). A much more "aggressive" competitor, Automatic Products (A. 783, 1029), had been selling practically the same kind of machine (The Candyshop) as Lektro-Vend for nearly the same length of time at a substantially lower price (A. 784, 1030, 1043, 1085). The Candyshop outsold the Lektro-Vend "8 or 10 to 1" through 1969 (A. 821). Lektro-Vend's gross sales through 1969 were only $7 million.

The sole evidence of damages are those suffered by Vendo by reason of its not having an imaginary competitive FIFO machine. *There is no evidence in the record to support an award of damages suffered by Vendo because it lacked the Lektro-Vend machine.*

(C) Vendo's Market Survey On Which All The Expert Testimony Was Founded Was Not Probative Evidence And Should Be Disregarded.

The keystone for the experts' testimony that Vendo's damages were due to its failure to have FIFO was Forney's candy market survey report (PX 114) from which he concluded that 67% of all the candy, pastry and snack vending machines sold in 1969 were FIFO (DX 201, p. 1).

Vendo's candy survey, however, by Forney's own admission, twice repeated in testimony (A. 776, 779, 808-9) and twice explicitly stated in reports he wrote (PX 114, p. i., DX 203, p. 1), did not include a sufficient number of street operators, who represent 40 to 50% of the total customers in the candy vender market (A. 778, 1129).

The candy survey warned that the survey included too many "industrial operators" and not enough "street operators" and that therefore "inferences concerning competitive positions within the *total market* should be avoided" (PX 114, p. 1; emphasis in original; see also A. 776, 779, 808-9, DX 203, p. 1). The Appellate Court noted this defect (App. E 293). While "industrial operators" prefer FIFO vending machines, "street operators" prefer non-FIFO vending machines (A. 775, 1026-27, 1118). Most "street operators" in fact purchase non-FIFO machines (A. 778, 1027). Forney's estimates are thus based on a survey which took into account only a biased sampling of the "universe" of confection venders; and are by his own admission prejudicially distorted.

Forney's estimates were provided to Vendo's two experts (DX 206). Relying on Forney's estimates, they reasoned that FIFO machines rapidly took over a major part of the market and that a company without a FIFO machine was unable to compete effectively in this market. They concluded that the proximate cause of Vendo's damages was its failure to have a FIFO vending machine (PX 129, A. 878, 902, 911, 915-917, 990-91). One expert admitted that if FIFO were not "a very important part of the market", as indicated in Forney's estimates, his opinion could be different (A. 915-16).

We argued that the burden was on the party offering the survey to lay a foundation by showing that the survey was conducted using correct methodology, citing *Bank of*

Utah v. *Commercial Security Bank*, 369 F.2d 19, 27 (10th Cir. 1966) and *American Luggage Works* v. *U.S. Trunk Co.*, 158 F.Supp. 50, 53 (D.Mass., 1957), affirmed sub. nom., *Hawley Products Co.* v. *United States Trunk Co.*, 259 F.2d 69, 77 (1st Cir. 1958), and that Vendo's proof rested entirely on its survey, quoting "without the poll, plaintiff surely cannot prevail". *American Luggage*, 158 F.Supp. at p. 51.

The Supreme Court stated that our "criticism is blunted, however, by [our] failure to object to the admission of the exhibits containing the information in question" (App. F 312), ignoring the fact that we pointed out on rehearing that we objected to the exhibits and testimony based on the survey (App. G 24). The court ignored that the survey revealed its non-probative character, *for how can one conclude from a survey made of only half of a universe where operators prefer FIFOs that an equal number were sold in the other half of the universe where operators prefer non-FIFOs.* Further, evidence goes in only for what it is worth, and if it isn't probative, "it makes no difference whether it goes in under objection or without it" (*Knudson* v. *Knudson*, 382 Ill. 492, 499, 46 N.E.2d 1011, 1015 (1943)).

Even if the survey were reliable, however, Forney's estimates would not be protected by that fact, for they are ineradicably stained by their admitted partisan character: made "for the Vendo theory of this litigation," they "had no other real purpose," Forney testified (A. 766). See *Sears, Roebuck & Co.* v. *All States Life Ins. Co.*, 246 F.2d 161, 171-72 (5th Cir. 1957). Moreover, the estimates are manifestly inflated; for the years 1966-68, Forney's estimates are two to three times those made by Vendo's salesmen and Sales Vice President (DX 204, p. 2; A. 1032).

CONCLUSION

We regret the length of this Petition but we know of no other way to present the matter adequately. How can a court constitutionally affirm a $7,345,500 judgment on a record such as this? We pray that the Petition be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF TRIAL COURT OF DECEMBER 16, 1966 AND JUDGMENT ENTERED DECEMBER 27, 1966

OPINION OF TRIAL COURT

(The trial court, on December 16, 1966 after hearing closing arguments, delivered the following oral opinion from the bench and ruled on the case, as follows):

1890 The Court: Well, this has been a lengthy case, but it is not the only lengthy case that I have just concluded. I am reminded of the common instruction that we give all juries, that we are to exercise our common sense and good judgment gained from our observation and experience in the affairs of life.

I take it that applies to judges who try cases involving corporation against corporation and their various methods of buying their competitors' products for the purposes of analysis and comparison, and duplication, and many other things that had never occurred to me, perhaps, prior to having such litigation presented in front of me.

But in this case I have had the benefit of competent counsel who have worked hard and diligently in preparing the Briefs. I did read some of the actual testimony previously. But, as I requested you gentlemen during the summer to collaborate and come up with an Abstract of testimony which would eliminate a great deal more work on my part, I am most grateful for your having done so. It was very illuminating
1891 to me to read and reread certain portions of that Abstract.

I think I should also comment on one other feature that is apparent in every case and that is: The Court or the Jury has the sole responsibility of judging the credibility of the witnesses and the manner in which they testify, their interest, lack of candor, and general appearance in the courtroom, where I am sure that the appeals courts are never fully aware of the facemaking or head shaking that goes on during the course and conduct of a trial.

I am also aware that as counsel sit at the counsel table that they are not always aware of what goes on in back of them, whether it is to their favor or to their disfavor. But the Court quite frequently follows the witnesses in their spoken word as well as observing the expressions that appear and mannerisms in the courtroom.

I have been thoroughly interested in the Briefs that you have prepared and the material covering the law.

1892 I think as the record now stands I have previously ruled that I didn't think your Affirmative Defenses of the antitrust phase of this case, either the application of the Federal act or the State act, had any applicability in this case.

I don't know whether that is reflected in an Order or not, but it should be.

Mr. Baker: We had no Order dismissing it.

The Court: Well, I wanted to repeat myself so there would be no doubt about the status of the record.

Now, in reviewing the testimony that was given, there are a number of conflicting statements. Mr. Ochsenschlager has characterized the conduct of Mr. Stoner—or the theory of the Stoner defense as unbelievable. I presume everyone has the prerogative of using whatever descriptive language he sees fit to use, but it is a little amazing to me.

I might say that I have had the experience of being a corporate director and also being a corporate president. So I think I have some understanding of what is the responsibility of an officer, and I am sure I am fully aware of the responsibility of a
1893 director.

It was always my feeling that I was acting in a fiduciary capacity for the benefit of all stockholders. And even though I, in one instance, wanted to make a complete disbursal of all of the assets of a company, I felt that I couldn't undertake to do this because if I were to do it I'd be assuming a personal

responsibility to a very contingent creditor that I just couldn't afford to assume.

But in this case when you consider the testimony as to the entering into of this agreement of sale and the employment agreement, I take into consideration that neither counsel engaged in the trial of this case were present or participated in these agreements. And as has been pointed out, each case must stand upon its own particular set of facts.

The very case which Mr. Baker has cited in the prior arguments which I recall and have had occasion to reread a number of times was the Parish v. Schwartz case. There they cite with approval the
1894 Lanzit case, which, again, Mr. Baker commented on. And you will find in that case the statement which says that a contract which is only in partial restraint of trade will be held valid if it is reasonable and has a valuable consideration to support it.

I don't remember whether Counsel cited the case or whether the Court did, but I have always been conscious of Justice Schaefer's opinion in the case of Bauer v. Sawyer. That was the doctors' case where he had agreed to practice medicine in Kankakee and the one doctor saw fit to withdraw. And as I remember the language there, the Justice said that he didn't think it would make too much difference if there was one less doctor practicing in Kankakee.

It is my understanding that these agreements are enforceable if they are reasonable both as to area that they purport to cover and as to the time that they purport to cover.

In this case, the time was fixed, it is my recollection, for a ten-year period. Counsel cite the case of

Reuben H. Donnelley Corporation v. United States, 1895 257 F. Supp. 747, and it is my understanding that in that case a ten-year period was held not to be unreasonable.

Now, there have been many discussions in the last year in seminars that I have attended, both here in Illinois and elsewhere, about perhaps changing the dead-man statute to permit testimony if someone is deceased. In this particular case, Mr. Stoner has seen fit to characterize these contracts as void and not worth the paper they are written on. But having been admitted to the Bar of the State of Illinois with the late Ed Streit, never having tried a case with him but having tried enumerable cases on the opposite side of the counsel table from him, I recognize his ability and his integrity as an attorney.

But even in that statement if we were to accept that statement as being truthful, I think I should also point out the absolute contradictory statement of Mr. Stoner when he goes to the Vendo corporation according to his testimony and states that some of 1896 the men thought that he would be released from his contract. But then he appeared at the last board of directors' meeting that he did attend and requested the release of his employment contract and was told by Mr. Pierson that perhaps that was a matter that the board would have to pass on and that it would be his recommendation as the president that he not be released from the terms of his employment contract, which to me is only consistent with an obligation that a president would have in any corporation. While it wasn't spelled out letter for letter, I take

it the consensus of the board meeting was that Mr. Stoner was not released from his agreement.

So you have those inconsistent statements in the record. Then you have the conduct of the defendant, Mr. Stoner, himself. And it is coincidental, the men who were employed by Mr. Stoner in the Stoner Manufacturing Company; namely, Mr. Jack Stewart, who was well known to, I think, all of the lawyers in Aurora having been the operator of a downtown
1897 clothing store for many years and a rather affable gentleman. Some of the other men were unknown to us, Mr. Lazzara, Mr. Phillips, Jr. and Sr. Mr. Kaman was only there a short while, but did not go with the Stoner Investments, Inc., but went with the Skil Corporation it was my recollection.

And then when you consider the testimony in the light of the Phillips going into the business of making a coin changer and vending machine and the several meetings that took place between the planing department of Vendo and those engaged in the Stoner Company and the similarity of the devices, which was apparent to me—I am not a patent lawyer —, it didn't seem to me to take any great ingenuity to come up with an idea of making something that would be usable and, perhaps, saleable.

As to the loans by Mr. Stoner to the Phillips, Mr. Baker will say, "A mere loan is not violating the terms of an agreement." And I take it that that would be a correct statement of the law if it were strictly a personal loan not for the purpose of engaging in
1898 a like or similar business venture of one you had just sold your business to.

Another factor that I think is somewhat amazing is the fact that Mr. Stoner knew of this undertaking of the Phillips to put together a vending machine and his discussion with The Vendo Company as to the possibility of their acquiring this particular machine.

I have searched this record and the evidence to ascertain whether I had missed something; but nowhere did I find out any disclosure by Mr. Stoner that he had financed this undertaking, unless, perhaps, if at all, I think Mr. Stoner's words were that he didn't think that he told anyone.

But I asked myself the question: What is the responsibility of a man who is in a position of trust and a fiduciary capacity to the stockholders? Some of these stockholders were members of his own family at one time or another. I find it most difficult to come up with an answer that that sort of conduct is conducive and in compliance with the responsibility as a director of a corporation.

1899 Now, there is another matter of evidence which none of you gentlemen have touched on today. I doubt that you did before because I am sure the witness had not previously testified. And that was the witness Mr. Cayne, whose testimony was to the effect that he had represented Stoner. He said, "Stoner"; he didn't say, "company." But it is my understanding that he also represented Mr. William Phillips, Mr. Rod Phillips, and Mr. William Callahan, who was, likewise, an employee of Stoner and Vendo, in prosecuting and procuring a patent for an electrically operated merchandise vending machine. That was found

at page 1331 of the testimony and page 288 of the Abstract.

On page 299 of the Abstract and at page 1384 of the testimony, Mr. Cayne testified that he had known Harry Stoner since 1930, and he knew Rod Phillips, and he worked for Stoner, and he knew William Phillips, and he handled the prosecution of the electronic coin detecting device for Bill Phillips. (Reading)

"I did it for him, he was the one who came to me, and I think it was for the Phillips Com-
1900 pany. He did not tell me when he first came to me that this was going to be assigned to Stoner Investments, Inc. I prepared the document of assignment of the patent from William Phillips to Stoner Investments, Inc., having been told of the assignment by either Bill Phillips or Rod Phillips."

Now, I don't think that a Judge or a Jury can put their head in the sand and ignore statements in the evidence that you hear.

But the fact of these loans, the fact of the sale of a business—or not of a business, but of a building, the testimony of a disinterested witness of the visits of Mr. Stewart, and Mr. Lazzara, and the Phillips to the building before it was completed, I think in one case the statement was made it was being erected for the Phillips Company which apparently is known as Lektro-Vend—I find myself asking a number of questions of myself:

Whether or not the conduct of the individual de-
1901 fendant is consistent with his obligations as a director in a corporation which wasn't paying him a nominal salary. In fact, it is a salary that is much

more than you find in other like endeavors, although I guess today some corporate presidents and sales managers are paid astronomical figures. But $50,000.-00 a year is not exactly a nominal salary. And as one of the men from Missouri stated—I like to refer to those individuals as show-me boys because I guess that is what they call the people that come from that state—one of them said, "We sort of felt we ought to get a quid pro quo," which comes back to some of our basic concepts of contractual duties.

Being mindful that this is an equity case in which the burden of proof is not the same as in a criminal case or perhaps in a strict case of law, but it is addressed to the equitable conscience of the Court, I have pointed out that I didn't think a ten-year period was out of line based upon decisions. I have pointed out that the restraint of trade—partial re-
1902 straint of trade, if any, is something that I don't find myself giving too much concern.

I think you gentlemen can understand the reasoning for that because in the record here it is replete with various names, many of which I can't recall at this moment; but there was Seeburg, there was U-Select-It, there was Rowe, there was Canteen I believe. And, again, as I say, you don't set aside your observation and experience in life. And as you drive around the streets of a town or village, sometimes you see signs of buildings that advertise people who are making canteens or vending machines. So that I don't believe that I should bother myself with the possibility of the public being injured in such a case as has been presented to me.

Again, Mr. Stoner in his testimony referred to the fact that Vendo was making a lot of money. And if you are to follow his suggestion or innuendo, they would have made more money.

But again you can't overlook the testimony of Mr.
1903 Popp, whose testimony as I recall it was that he received a telephone call from Mr. Stoner and that he stopped at Mr. Stoner's mother's home. And quoting the words of Mr. Popp, "Mr. Stoner felt that he had made a bad deal and he wanted to get out of it."

Then within a week as I recall, Mr. Popp received a telephone call from the late Edward Streit that they were taking out various items of tools or equipment out of the Stoner then Vendo Company and that he, Popp, went to the company and that he, Popp, called the Vendo Corporation in Kansas City to inquire of them what, if anything, they were going to remove and as I recall the testimony it was a shear.

Now, in these cases, I think both in the Parish case and in the doctor case, the Court commented upon the fact that it was a difficult question to arrive at a damage figure. And I have asked myself the question, "What would twelve people do if they had heard this case and they were called upon to arrive at a damage figure?"

1904 We have valuations placed on this machine by Mr. Stoner. In fact, he recommended the payment of a million and a half dollars to Vendo for the Phillips machine. On the other hand, I think it was Mr. Andrews who testified that in his judgment it would cost somewhere between three and four hundred thousand dollars to do the tooling and designing to pro-

duce this particular machine. I am satisfied the record is replete with statements. I believe Mr. Childers made the statement that they were interested in this machine as an adjunct to their existing line of equipment, but not at the figure of a million and a half dollars.

Mr. Ochsenschlager has suggested the loans by Mr. Stoner of $250,000.00 for the tooling and designing to put this machine together. Those are figures that a Jury might take into consideration.

I think while I am commenting on it, I should also comment that it is unusual that you do find people who loan money without interest. I have never been in
1905 that category. And then coupled with that, the sale of this building and the sale to a new corporation with no sales experience and the guarantee—I have forgotten whether that was the personal guarantee of Mr. Stoner or the guarantee of Stoner Investments, Inc.

But taking those factors into consideration together with the payment of the salaries to these men while they were working on this machine which the defendant Stoner attempted to sell to the company that he was a director in to me just seems to run contrary to my concept of equity and good conscience and my concept of what constitutes a legal and binding agreement, an agreement for the sale of a business and an employment agreement.

Mr. Baker pointed out that this agreement was world-wide and that that was primarily for the benefit of Vendo corporation. But in the same breath in fairness to Mr. Baker, he did point out in fairness to me that the Stoner corporation was doing business

throughout the United States and had had some foreign negotiations. Whether they had ripened into licensing agreements from which there was money coming, I am not certain from a reading of the record.

I take it first I should grant the prayer to amend your Complaint for ad damnum. My understanding is under the Practice Act that can be done either before or after a jury verdict or after the Court's decision.

So that it is my finding that an injunction will issue against Harry Stoner and against Stoner Investments, Inc.

There will be a judgment of $250,000.00 against Harry Stoner personally and a judgment of $1,100,000.00 against Stoner Investments, Inc., and Harry Stoner.

TRIAL COURT JUDGMENT

This matter coming on for a hearing on the merits, and the Court having heard testimony and having received evidence, and having heard the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged And Decreed as follows:

1. That the plaintiff, The Vendo Company, a Missouri corporation, do have and recover of and from the defendant, Harry B. Stoner, the sum of Two Hundred Fifty Thousand Dollars ($250,000) and costs, and have execution therefor.

2. That the plaintiff, The Vendo Company, a Missouri corporation, do have and recover of and from the defendants, Harry B. Stoner and Stoner Investments, Inc., a Delaware corporation, the further sum of One Million One Hundred Thousand Dollars ($1,100,000) and costs, and have execution therefor.

3. That defendant Harry B. Stoner be, and he is hereby, restrained and enjoined from engaging, directly or indirectly, in the vending machine manufac-
C-251 turing business, individually or as a partner, employee or agent, anywhere in the United States or in any foreign country in which The Vendo Company engaged in such business (as of June 1, 1959), until June 1, 1969.

4. That defendant Stoner Investments, Inc., be and it hereby is, restrained and enjoined from engaging, directly or indirectly, in the manufacture and sale of vending machines in the United States and in any foreign country in which The Vendo Company engaged in such business (as of June 1, 1959), until June 1, 1969.

5. That the issuance of any execution or writ of injunction pursuant hereto is stayed for a period of 30 days from the date hereof.

Enter this 27th day of December, A.D., 1966.

/s/ John S. Petersen
Judge

APPENDIX B

FIRST APPELLATE COURT OPINION

The Vendo Company, a Foreign Corporation, Plaintiff-Appellee, v. Harry B. Stoner and Stoner Investments, Inc., a Foreign Corporation, Defendants-Appellants.

Gen. No. 68-1.

Second Judicial District.

January 30, 1969.

Rehearing denied March 24, 1969.

1. Trademarks, Trade Names and Unfair Competition, § 6.5 *— trade secrets.

Trade secrets evolve from the means, not the end, and plaintiff manufacturer and seller of vending machines could not be said to have had a trade secret subject to improper appropriation by others where plaintiff had nothing more than a goal in mind, that of economically producing a vending machine having specified

* See Callaghan's Illinois Digest, same topic and section number.

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features, but had not discovered a means of achieving such goal.

2. Trademarks, Trade Names and Unfair Competition, § 7 *—facts precluding holding trade secret was appropriated.

Vast difference between plaintiff corporation's models, and certain vending machine having three characteristics, namely positive stock rotation, with first product stocked being first one sold, continuous display through a window of actual product to be vended, and capacity for stocking mixed products in single conveyor, precluded holding that developers of such vending machine had appropriated trade secret from plaintiff.

3. Trademarks, Trade Names and Unfair Competition, § 6.5 *—prerequisite to cause of action for trade secret appropriation.

Before cause of action will lie for appropriation of trade secret, it must be shown that secret was disclosed to or learned by defendant while in position of trust and confidence.

4. Trademarks, Trade Names and Unfair Competition, § 18 *—sufficiency of evidence.

Evidence did not establish that design of certain type of vending machine was disclosed to or learned by defendant, so that finding of appropriation of trade secret would not be justified, the rule being that, before cause of action will lie for appropriation of trade secret, it must be shown that secret was disclosed to or learned by defendant while in position of trust and confidence.

5. Trademarks, Trade Names and Unfair Competition, § 7 *—appropriation of trade secrets.

One may not employ others to appropriate trade secrets which he himself might not appropriate.

6. Contracts, § 145.5 *—covenant against competition.

Generally a covenant against competition, ancillary to sale of business or employment contract, will be upheld if restraint on trade is reasonable in terms of time and territory, with question of reasonableness depending on circumstances of each case.

7. Contracts, § 145.5 *—validity of covenant against competition.

Generally, covenant against competition, ancillary to sale of business or employment contract, is void if restraint covers entire state, unless restraint lasts during contractual relationship of parties.

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* See Callaghan's Illinois Digest, same topic and section number.

8. Contracts, § 145.5 *—noncompetition provision of employment contract.

During five-year term of employment contract between corporate plaintiff and individual defendant who sold to plaintiff assets of business, provision restraining individual defendant from competing with plaintiff would be held valid and enforceable regardless of whether it was unreasonably broad, and where such restraint provision was breached during five-year employment term, continued competitive activities thereafter, also prohibited by contract for additional five years, would not be sanctioned since, to do so, would be tantamount to sanctioning earlier breach.

9. Contracts, § 585.5 *—evidence in action for breach of noncompetition covenants.

In action by manufacturer and seller of vending machines, evidence established that considerably more than mere making of loans and leases to competitor of plaintiff was done and that activities of defendants, including activities of individual defendant who had sold to plaintiff assets of business, amounted to direct or indirect entering into or engaging in vending machine business although ancillary employment contract between plaintiff and individual defendant restrained individual defendant from competing with plaintiff.

10. Damages, § 69 *—salary forfeiture for breach of noncompetition covenants.

Where individual defendant, who sold to plaintiff assets of business, breached provision of ancillary employment contract restraining individual defendant from competing with plaintiff, forfeiture of individual defendant's salary under ancillary agreement during period breach was occurring was required.

11. Damages, § 69 *—damages for breach of noncompetition covenants.

Where individual defendant, who sold to plaintiff assets of business, breached provision of ancillary employment contract restraining individual defendant from competing with plaintiff, plaintiff, in addition to right to recover salary paid individual defendant during breach, would be entitled to recover any damages to plaintiff's business occasioned by breach.

12. Damages, § 69 *—breach of noncompetition covenants.

Damages to plaintiff's business, which plaintiff would be entitled to recover where individual defendant, who sold to plaintiff assets of business, breached provision of ancillary employment

* See Callaghan's Illinois Digest, same topic and section number.

contract restraining individual defendant from competing with plaintiff, would be measure of lost profits to plaintiff during period of breach, plus diminution of plaintiff's business at end of period covered by anticompetition covenants.

13. Appeal and Error, § 2049 *—further evidence on remand.

On remand of cause, trial court, to extent record was wanting of proof on question of extent of damages, would entertain further evidence of such damages.

14. Contracts, § 453 *—employment contract as not waiving right to damages for breach.

Employment contract which was ancillary to sale by individual defendant to plaintiff of assets of business, did not in effect waive plaintiff's right to damages in event of breach by individual defendant of noncompetition covenants, and provision authorizing plaintiff to terminate contract on 30 days' notice in event of substantial violation thereof by individual defendant did not constitute implied waiver by plaintiff of right to damages in case of breach.

15. Trademarks, Trade Names and Unfair Competition, § 21 *—sufficiency of complaint to justify injunctive relief.

In action alleging breach of noncompetition covenants in employment contract, sufficient allegation of irreparable damage to justify injunctive relief was made in complaint reciting that defendant would continue in engagement in certain enterprises and cause continuing irreparable damages to plaintiff, and would cause plaintiff irreparable damages in future, unless restrained by injunction.

16. Injunctions, § 139 *—necessity of specific prayer.

Party seeking relief by way of injunction, must specifically pray for such relief, otherwise court will not aid him.

17. Trademarks, Trade Names and Unfair Competition, § 22.5 *—evidence justifying finding of irreparable injury.

In action by manufacturer and seller of vending machines alleging breach of noncompetition covenants in employment contract ancillary to sale of business by individual defendant to plaintiff, evidence showing impact on vending machine industry of certain machine, coupled with proof of individual defendant's influence in development of that machine, justified finding, implicit in issuance of injunction, that plaintiff suffered actual or threatened irreparable injury from individual defendant's wrongful activities.

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* See Callaghan's Illinois Digest, same topic and section number.

18. Trademarks, Trade Names and Unfair Competition, § 23 *—injunction reasonable in scope.

Injunction, granted in action alleging breach of noncompetition covenants in employment contract, would be held reasonable in scope where it was consistent with allegations and prayer of complaint and restraint imposed by injunction was no more broad than reasonable restraint imposed by employment contract.

19. Contracts, § 156 *—defense predicated on federal antitrust statutes.

Mere fact that defense, in action alleging breach of noncompetition covenants in employment contract, was predicated on federal antitrust statutes, did not in itself deprive state court of jurisdiction to hear and pass upon such defense.

20. Contracts, § 156 *—defense predicated on state antitrust laws.

State antitrust laws are applicable only to intrastate commerce, as distinguished from interstate commerce, and defense predicated upon such laws was not applicable where business covered by contracts involved in breach of contract action was not only interstate, but international.

Appeal from the Circuit Court of Kane County, Sixteenth Judicial Circuit; the Hon. JOHN S. PETERSEN, Judge, presiding. Affirmed in part, reversed in part, and remanded.

Sidley & Austin, Boodell, Sears, Sugrue & Crowley, of Chicago (Barnabas F. Sears and Gerald M. Sheridan, Jr., of counsel), for appellants.

Reid, Ochsenschlager, Murphy and Hupp, of Aurora (Stephen J. Mrkvicka, of counsel), for appellee.

MR. JUSTICE SEIDENFELD delivered the opinion of the court.

Defendants, Harry B. Stoner and Stoner Investments, Inc., appeal from judgments in a suit for breach of a sales and employment contract and for injunctive relief, heard without a jury.

Judgment was entered in favor of the plaintiff and against the defendants as follows: (1) against Harry B.

* See Callaghan's Illinois Digest, same topic and section number.

Stoner in the amount of $250,000; (2) against Harry B. Stoner and Stoner Investments, Inc., in the amount of $1,100,000; (3) against Harry B. Stoner, restraining him from "engaging, directly or indirectly, in the vending machine manufacturing business, individually or as a partner, employee or agent, anywhere in the United States or in any foreign country in which the Vendo Company engaged in such business (as of June 1, 1959), until June 1, 1969; and (4) against Stoner-Investments, Inc., restraining it in similar terms."

A question is also raised on the pleadings, arising out of the court's order striking certain defenses and counterclaims based upon the Federal and State Antitrust laws.

In April, 1959, the defendant corporation was principally engaged in the business of manufacturing and selling candy vending machines throughout the United States, and was about to license a company to sell its machines in England. This corporation will herein be referred to as Stoner Investments, its present name, notwithstanding that it was named Stoner Mfg. Corp. in 1959. The corporate shares of Stoner Investments were owned in 1959 by defendant Harry B. Stoner, his wife, his mother and his sister-in-law, Ruth Netrey. Mr. Stoner was, without dispute, the principal officer and in control of the management of the corporation.

The Vendo Company, in 1959, had been one of the leading manufacturers and sellers of vending machines for hot and cold beverages, ice cream and certain other products. The company did not manufacture or sell vending machines for candy, cigarettes, hot sandwiches and instant coffee and tea at that time, but such machines had been considered and were in various stages of research and development. Vendo machines were then being sold in 58 countries in every continent. Clearly, Vendo was a considerably larger and more diversified company than Stoner Investments.

On April 3, 1959, a contract was executed by which Vendo agreed to purchase Stoner Investments' assets, excluding real estate and improvements thereon, cash on hand or on deposit, and receivables. In essence, Vendo was to pay $3,400,000 in cash, subject to certain adjustments, deliver 60,000 shares of its fully paid and nonassessable common stock, pay a portion of its profits in excess of $250,000 in any calendar year from the assets being purchased for a period of ten years, pay 25% of monies received from sales outside the United States of Stoner Investments' products, also for a period of ten years, assume responsibility for the collection of accounts receivable, and pay all debts, obligations and liabilities of Stoner Investments. The sales agreement imposed the following restriction on the selling corporation:

> "Section 15. From and after the closing, the Company [Stoner Investments] will not own, directly or indirectly, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10) years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company."

In addition to the sales agreement, an employment contract was executed whereby Mr. Stoner would serve Vendo in an executive capacity for five years, or until June 1, 1964, at an annual salary of $50,000. This agreement also contained a noncompetition clause which reads as follows:

> "5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or salesman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter."

The employment contract provided that Mr. Stoner "shall regulate his own hours of employment and shall determine the amount of time and effort which he shall devote" to Vendo, and that the value of his services are not to be measured by the time and effort he devotes to the business, but by his advice, counsel, know-how and experience. The contract further provided, inter alia, that Vendo "shall have the right to terminate this agreement upon thirty (30) days' notice in the event of the substantial violation of the terms hereof by Stoner."

There was evidence offered to show that Mr. Stoner, after the signing of the sales agreement but before the closing of the transaction, had second thoughts about the wisdom of the sale. He made statements to this effect

to the business representative of the union for the plant's employees, intimating at the time that many of the employees would be losing their jobs and that equipment was being moved out of the plant. It does not appear that the union took any action—other than to investigate—as a result of these conversations.

Almost immediately after the take-over by Vendo, several points of friction developed between Mr. Stoner and certain of Vendo's other executives. Essentially, Mr. Stoner complained that his services were not being utilized, that he was being treated as nothing more than a "figurehead," and that the procedures and employees of Vendo were ineffectual.

For several years prior to the sale to Vendo, R. W. Phillips (Rod) had been the Stoner plant superintendent, and his son, William Phillips (Bill), had been assistant superintendent. Rod was liaison engineer between the engineering and production departments, and participated in design work on a day-to-day basis. Bill had a degree in aeronautical engineering and Navy training in electronics.

Bill resigned from Vendo in June or July of 1960, ostensibly because he was no longer in line to become the plant manager, and because he purportedly disagreed with Vendo's philosophy and attitude concerning product quality. Within two months of his resignation, Bill met with Mr. Stoner and proposed that the latter finance the development by Bill of an electronic coin detecting device which he had conceived, and which would be of considerable value in the vending machine as well as in other industries. That discussion concluded with the agreement that Stoner Investments would pay Bill a salary of $650 per month to develop such a device, and any patents thereon would belong to Stoner Investments. Bill's father, Rod Phillips, was present at the time of this conversation.

Working primarily in his basement at home, Bill nearly completed the coin detector by the end of 1960. A patent

was issued in October of 1961, and was assigned to Stoner Investments. Except for a "breadboard" model, the coin detector was never produced. Bill received a total of $3,250 as salary from Stoner Investments for his work on the coin detector, and in addition was reimbursed nearly $1,000 for expenses.

Rod Phillips also resigned from Vendo in mid-1960, at about the same time as Bill resigned. Rod's stated reason for leaving was that he resented "spying" on the progress of another company which manufactured slug-rejectors. Rod spent approximately six months after his resignation in retirement, and it was during this period of time that his son, Bill, was designing the electronic coin detector with the financial aid of Stoner Investments.

In late 1960 or early 1961, when Bill's design of the coin detector was virtually completed, Rod approached Mr. Stoner with the request that Stoner provide sufficient funds to enable Rod to engineer and develop a particular type of vending machine. Mr. Stoner agreed to have Stoner Investments make noninterest bearing loans to Rod for that purpose. According to the testimony of defendants, neither Mr. Stoner nor Stoner Investments was to have any ownership or control in Rod's venture, it being their position that Rod was entitled to this consideration for his many years of loyal service to Stoner Investments. During 1961 and 1962, Stoner Investments loaned Rod Phillips a total of $206,000.

In addition to making the above loans to Rod, Mr. Stoner made available to Rod and Bill in early 1961 an old milk plant building known as the Middle Avenue Building. Rod was charged no rent, but made repairs to the building with materials purchased by Mr. Stoner.

In August of 1961, two other former employees of Stoner Investments—and then employees of Vendo—resigned from Vendo and joined Rod and Bill. Their combined salaries of $1,150 per month were paid by Stoner Investments until December of 1962. One of these men

had between fifteen and twenty years of design experience with Stoner Investments prior to the sale to Vendo, and the other had served as a toolmaker.

The vending machine developed by Rod and Bill Phillips was to be used for the vending of candy. There were three characteristics of this machine which contributed to its eventual popularity and acceptance, namely: (1) positive stock rotation, known as first-in first-out, or FIFO, where the first product stocked in the machine would be the first one sold, thus reducing the chance of vending or discarding stale candy; (2) continuous display through a window of the actual product next to be vended; and (3) capacity for stocking mixed products in a single conveyor, and consequent elimination of the usual necessity to sell out the product before restocking with a different product. Although machines having those features had been on the market for many years, none had incorporated all three of the above characteristics, and in fact no practical machine with all these characteristics had ever been developed previously.

It is one of Vendo's contentions herein that Mr. Stoner's financial participation in the development of this machine amounted to the appropriation of a trade secret of Vendo.

It is uncontroverted that Vendo, before the acquisition of the Stoner plant, had been taking steps with a view toward the development of a FIFO candy vending machine that incorporated a window displaying the actual product to be vended, and which would permit the stocking of mixed products in a single conveyor. The authority for an expenditure on such a project was first assigned by Vendo in December of 1958. This project led to the fabrication of two "developmental mechanisms." Neither of these models included the vend-the-bar-you-see window, although an artist's sketch of a complete machine, having such windows in front of each conveyor, was prepared. There was evidence to show that artist's

sketches of Vendo's contemplated machine were shown to Mr. Stoner and Rod and Bill Phillips in early June, 1959, almost immediately after Vendo's acquisition of the Stoner plant.

One of these models was exhibited at a products planning meeting at the Stoner plant on August 3, 1959, at which Mr. Stoner and Rod Phillips were present. At that meeting, the Stoner Division sales manager said the machine was deficient in three respects: (1) the product would have to be stocked upside down; (2) the machine could tip over during loading because all of the conveyors would have to be swung out; and (3) production of the machine would be unduly expensive. The minutes of that meeting stated that the Sales Department "feels the objectives of stock rotation and visual display are sound but the particular design in question is not acceptable because of loading and inventory problems." These minutes went on to state that Vendo's Research and Engineering Department "is to continue research as to how to basically improve the stock rotation idea so that it can be made practical."

In January, 1960, Vendo's Vice-President in charge of Research and Engineering made a handwritten notation on an interoffice memorandum, stating: "I agree on the need for rotation of stock, but not on [this]unit. I think a better one could be devised." Neither of these models was patented, and a Vendo executive had written patent counsel that "we do not intend to commercialize" these models. In September and October of 1960, Vendo sent both models to Vendo's "morgue" which, according to our reading of the record, is the destination for nonactive—but not necessarily abandoned—projects.

The machine developed by Rod and Bill Phillips was called the Lektro-Vend machine, and while incorporating the three characteristics of first-in first-out, a vend-the-bar-you-see window, and mixed stock in a single conveyor, it differed in many basic respects from the models de-

veloped by Vendo. For example, the Lektro-Vend machine was electrically powered while Vendo's was to be mechanically powered; Vendo's machine required approximately 4,000 screws for the shelving mechanism, while the Lektro-Vend machine eliminated these by using a series of L-shaped shelves interconnected with pins; the conveyor in the Lektro-Vend machine moved in a track guided by plastic wheels, while Vendo's conveyor unitized bicycle chain affair with hooks; and the Lektro-Vend machine was loaded by tilting out the conveyor within the machine's center of gravity, thus avoiding the objectionable swing-out loading requirement of Vendo's machine. More significantly, the Lektro-Vend machine was functionally and economically successful, while many undesirable features of the Vendo machine rendered its production impractical.

The first prototypes of the Lektro-Vend machine were exhibited in October, 1962, at a trade show in San Francisco. This machine was accepted so well that another company took its own stock rotation (FIFO) machine off display. In fact, certain officers and directors of Vendo were so impressed with the machine that one of them approached Rod Phillips at the show and discussed the possiblity of Vendo purchasing the machine.

It appears that, prior to the show, Rod Phillips had intended to sell the Lektro-Vend design and tooling, but the industry's response to the machine led to Rod's and Bill's decision to manufacture and sell the machine themselves. After returning from the show, Rod discussed the response to his machine with Mr. Stoner, and invited Stoner to join with him in his plan to manufacture and sell the Lektro-Vend machine generally.

In December of 1962, immediately before the Vendo Board of Directors' meeting, Mr. Stoner told the Board Chairman that he, Stoner, would like a release from his employment contract, for the reason that he had an opportunity to invest in the Lektro-Vend machine and to

participate with Rod Phillips in its manufacture and sale. He was requested to submit his request in writing for the Board to consider. Mr. Stoner made no mention of his previous financial aid toward the development of the Lektro-Vend machine. In short, Mr. Stoner was told that with his capital and experiences, he would be a formidable competitor, and that part of the consideration for the sales and employment contracts was that Vendo would not be competing with Mr. Stoner or his company.

While his release from his contract was denied, he was requested to act on behalf of Vendo in looking into the purchase of the Lektro-Vend machine from the Phillipses. Stoner discussed the matter with Rod Phillips, and then arranged a meeting in January, 1963, which was attended by Stoner, Rod Phillips and certain of Vendo's officers. The Lektro-Vend machine was demonstrated and explained at that time, with Stoner taking no active part. Although price was not discussed at the meeting, Stoner later reported to Vendo that Rod Phillips was asking $1,500,000. Stoner testified that the Seeburg Corporation had shown an interest in purchasing the Lektro-Vend machine at that price.

Although Stoner recommended that Vendo purchase the machine, Vendo would not agree to pay such an amount. Instead, in March of 1963, in reply to an inquiry from Stoner, Vendo's Vice-President in charge of operations wrote that Vendo would only pay for out-of-pocket costs, "plus a fair profit to Rod and his associates; taking into consideration the amount of time, money and ingenuity which they had expended on the project, but that it was my feeling that this wouldn't add up to anything like $1,500,000."

Back in December, 1962, at about the time that Stoner was asking to be released from his employment contract with Vendo, his sister-in-law, Ruth Netrey, made a loan of $350,000 to Rod Phillips on his personal note bearing 4½% interest. Defendant's evidence is that

Stoner in no way persuaded or influenced Mrs. Netrey to make this loan, which within one year was increased to $525,000. Mrs. Netrey had been one of the shareholders of Stoner Investments at the time of the sale of assets to Vendo, but had since sold her stock in that corporation, as did Mr. Stoner's mother, leaving only Mr. Stoner and his wife as shareholders of the defendant corporation.

In March or April of 1963, Stoner Investments had completed the construction of a general purpose office and manufacturing building on Sullivan Road in Aurora, where it had owned 370 acres of vacant land. The original purpose for constructing this building was allegedly to enable Stoner to prefabricate homes in the winter and to start the development of an industrial park. Its first and only occupants, however, were Rod and Bill Phillips who used the building for the manufacture of the Lektro-Vend machine. There was evidence tending to show that Stoner and the Phillipses knew before the end of 1962 that the Sullivan Road Plant would be used by them for this purpose.

Admittedly, Mr. Stoner never advised Vendo until the Spring of 1963 as to his arrangements with Bill and Rod Phillips. He testified that while he made no attempt to conceal these arrangements, he did not regard them as being of consequence to Vendo.

The Lektro-Vend Corporation was organized on September 18, 1963, at which time its shareholders and the number of shares owned by each were as follows: Rod Phillips—2,875 shares; Glen Phillips—750 shares; Bill Phillips—1,125 shares; William Callahan (one of the former Stoner and Vendo employees who resigned from Vendo in August, 1961, and helped in the development of the Lektro-Vend machine)—250 shares; Ruth Netrey—5,000 shares.

On March 21, 1964, Stoner Investments contracted with Lektro-Vend Corporation to sell the Sullivan Road Plant

to the latter. To finance the purchase, Lektro-Vend made a 100% short-term loan from a Chicago bank, which the bank would do only upon Stoner Investments' guarantee to repurchase the property in the event of a default. The loan had since been extended on several occasions, with Lektro-Vend paying the interest thereon.

Mr. Stoner's employment contract with Vendo terminated by lapse of time on June 1, 1964, and was not renewed although Stoner was retained on Vendo's Board of Directors until the Spring of 1965. In that same month, Mr. Stoner's wife was issued 5,000 shares of stock in Lektro-Vend Corporation, and in the following month Mr. Stoner himself was issued an additional 5,000 shares. On June 30, 1964, Stoner made a personal loan of $100,000 to Lektro-Vend, and this was repaid in 1965 from the proceeds of a $185,000 loan to Lektro-Vend from Stoner Investments. During 1965 and 1966, a total of $402,000 was loaned to Lektro-Vend from Stoner Investments and Stoner Shopping Center, Inc., all evidenced by demand notes bearing 4½% interest.

In March, 1965, Lektro-Vend salesmen reported that Vendo's salesmen were circulating rumors to the effect that Lektro-Vend was about to go out of business. When this was reported to Stoner, he wrote a letter on Lektro-Vend stationery to fifty vending machine operators. This letter, referred to throughout these proceedings as the "Dear Operator" letter, stated that Stoner was "now interested in the new Lektro-Vend Corp.," and "if Lektro-Vend can depend on your confidence . . . I guarantee that Lektro-Vend Corp. will be here for a very, very long time."

It appears from the evidence that Mr. Stoner has never been active in the day-to-day management of Lektro-Vend, and that he does not maintain a desk or office on the corporation's premises. The frequency with which

he comes onto the premises varies—sometimes every day for a week, and sometimes not at all for a month. He is, however, consulted on financial and other matters.

Vendo filed its complaint herein on August 10, 1965, charging that Stoner and Stoner Investments breached their respective covenants against competition, which covenants are set forth above. An amendment to the complaint was filed on January 28, 1966, alleging that both defendants stole valuable trade secrets of Vendo, including the design for certain vending machines, which they appropriated for their own use and for the use of Lektro-Vend Corporation. The complaint, as amended, prayed for damages of $1,500,000 and for injunctive relief prohibiting defendants from engaging in the vending machine business. Neither Lektro-Vend nor either of the Phillipses was made a defendant.

At the conclusion of a bench trial, the court entered judgment against Stoner in the amount of $250,000, and against both Stoner and Stoner Investments in the amount of $1,100,000. In addition, both defendants were enjoined from engaging, directly or indirectly, in the business of manufacturing (and, in the case of Stoner Investments, selling) vending machines until June 1, 1969 in the United States and in any foreign country in which Vendo was engaged in such business on June 1, 1959.

In support of this appeal, defendants urge the following grounds: (1) that Vendo did not possess a trade secret; (2) that in any event there was no appropriation of such a trade secret, assuming it existed; (3) that the covenants against competition are invalid; (4) that in any event the covenants were not violated; (5) that damages were improperly assessed; (6) that the injunctive relief granted was unwarranted because of an insufficient showing of irreparable damage, and because it was vague and beyond the prayer of the complaint; and (7) that the trial court erred in striking the affirmative de-

fenses and counterclaim based on the plaintiff's alleged violation of the Federal and Illinois Antitrust laws.

The "Trade Secrets"

[1] We agree that plaintiff has not proven the appropriation of a trade secret, if indeed it has been shown that plaintiff even possessed a trade secret. Plaintiff had nothing more than a goal in mind—the goal of economically producing a FIFO machine with a see-the-bar-you-vend feature. However, plaintiff had not discovered a means of achieving this goal, and without this discovery plaintiff had nothing. There was no evidence offered to show that Vendo's goal or overall desire to produce such a machine was novel. Furthermore, the individual features which Vendo wanted to combine in a single machine were long and widely used in the industry.

If Vendo had discovered the *means* for achieving its goal, we might well have had a different view as to whether Vendo had a trade secret. But trade secrets evolve from the means—not the end. According to the American Law Institute Restatement, Torts, § 757, Comment b, a trade secret may consist "of any formula, pattern, device or compilation of information . . . ." Schulenberg v. Signatrol, Inc., 33 Ill2d 379, 385, 212 NE 2d 865 (1965), cert den, 383 US 959, states:

> "The controlling definition of a trade secret in Illinois is supplied by Victor Chemical Works v. Iliff, 299 Ill 532, 540, 132 NE 806, where this court said that it is *a secret plan or process, tool, mechanism or compound* known only to its owner and those of his employees to whom it is necessary to confide it." (Emphasis added.)

We know of no authority for the proposition that an ultimate goal or purpose, as distinguished from the means of achieving it, can be classified as a trade secret. On

the contrary, the authorities teach us that the trade secret must be in the plaintiff's "know-how," and Vendo simply did not "know how" to construct the particular machine it desired. This is evident from the record, where we see minutes of a Vendo meeting stating that the machine design "is *not acceptable* because of loading and inventory problems," and that the corporation "is to continue research as to how to basically improve the stock rotation idea *so that it can be made practical.*" (Emphasis added.)

[2] Apart from our conclusion that Vendo could not claim a trade secret in its models, the vast difference between these models and the Lektro-Vend machine, in terms of technology and design, is in itself sufficient to preclude recovery on the theory of the appropriation of a trade secret. The more essential differences are set forth above, and the success and acceptance of the Lektro-Vend machine, compared to the unacceptability of Vendo's, speak for the materiality of these differences. And Vendo's theory of appropriation can hardly stand in the face of its previous attempts to purchase the Lektro-Vend machine and pay some amount of money for the "ingenuity which [the Phillipses] had expended on the project." The fact that the Phillipses worked for approximately eighteen months on the Lektro-Vend machine before their prototypes were ready is, in itself, evidence that they did not "steal" Vendo's methodics.

[3, 4] A final observation should be made on the question of whether defendants appropriated a trade secret. Before such a cause of action will lie, it must be shown that the secret was disclosed to or learned by the defendant while in a position of trust and confidence. Victor Chemical Works v. Iliff, 299 Ill 532, 548, 132 NE 806 (1921). In our opinion, the record before us falls far short of showing wherein the Vendo design was disclosed to or learned by Mr. Stoner. Sometime after the acquisition of the Stoner plant, Mr. Stoner was shown

pictures of a manual FIFO candy machine which did not have a stock display window. Stoner replied that this machine was similar to an Orange Crush machine which his corporation had built in 1940. While Mr. Stoner was present at the products planning meeting on August 3, 1959, where the Vendo model was shown, he was at the meeting for no longer than a few minutes. One witness, who is no longer employed by any of the parties, testified that Mr. Stoner was at that meeting for somewhere between thirty seconds and three minutes. It further appears that Mr. Stoner's presence at the meeting was for other purposes, and that the meeting was in fact suspended during his brief appearance. In the words of a Vendo employee, it was then and there that the Vendo machine was "kind of" explained to Stoner.

[5] It cannot seriously be contended that these brief glimpses and glances could be the foundation for the development of a revolutionary design that would take several skilled people eighteen months to develop. The only other evidence of disclosure relates to the Phillipses, not to Stoner. Thus, Rod and Bill Phillips were shown artists' sketches of the machine at about the time of the acquisition, or about one year prior to the Phillipses resignations from Vendo, and fully 1½ years before Rod began work on what was to become the Lektro-Vend machine. While Rod was at the products planning meeting on August 3, 1959, he was there only to help answer the question of whether such a machine could be produced at the Stoner plant. Neither the Phillipses nor the Lektro-Vend Corporation was made party to this suit. Although that, standing alone, would be no defense to Stoner, for one may not employ others to appropriate trade secrets which he himself might not appropriate (e. g., Colgate-Palmolive Co. v. Carter Products, Inc., 230 F2d 855, 864 (4th Cir 1956), cert den, 352 US 843 (1956), reh den, 352 US 913 (1956), we simply fail to see where sufficient information was disclosed to or learned by the Phillipses to enable them to design and develop the Lektro-

Vend machine. The evidence does not indicate that they were shown measurements, tolerances, materials, and the like, nor is there evidence that they made or were given pictures or drawings of what they were briefly shown.

The Covenants Not To Compete

Defendants next contend that the covenants against competition by Stoner and Stoner Investments are invalid and unenforceable as constituting unreasonable restraints of trade, and that these covenants, even if valid, were not breached by defendants.

[6, 7] The general rule is that a covenant against competition, ancillary to the sale of a business or an employment contract, will be upheld if the restraint on trade is reasonable in terms of time and territory, with the question of reasonableness depending on the circumstances of each case. E. g., Storer v. Brock, 351 Ill 643, 184 NE 868 (1933); Parish v. Schwartz, 344 Ill 563, 176 NE 757 (1931); Lanyon v. Garden City Sand Co., 223 Ill 616, 79 NE 313 (1906); Andrews v. Kingsbury, 212 Ill 97, 72 NE 11 (1904); Union Strawboard Co. v. Bonfield, 193 Ill 420, 61 NE 1038 (1901); Lanzit v. J. W. Sefton Mfg. Co., 184 Ill 326, 56 NE 393 (1900); Hursen v. Gavin, 162 Ill 377, 44 NE 735 (1896). This general rule has been interpreted in Illinois by a line of cases beginning with Parish v. Schwartz (supra), to mean that any such restraint covering the *entire* State of Illinois is, on its face, unreasonable and therefore void. The rationale of this rule is that no person should be required to leave the state in order to pursue his regular occupation, nor should the people of the state be totally deprived of his labors. It is on this proposition which defendants rely.

However, in spite of the widespread acceptance of this general rule, the courts of this and other jurisdictions have come to recognize an exception, which we believe applicable here, where the restraint lasts during the contractual relationship of the parties. Stated differently,

the territory covered by a covenant against competition, otherwise unreasonably broad, will not invalidate the covenant to the extent that it exists during the terms of the employment, lease, franchise agreement, etc.

The earliest case known to us which recognizes this exception to the general rule is Harrison v. Glucose Sugar Refining Co., 116 F 304 (7th Cir 1902). There the defendant had agreed that *during the term of his employment* he would not work for any glucose manufacturer other than the plaintiff within a 1,500 mile radius of Chicago, an area encompassing practically the entire United States. The court held the covenant valid and enjoined its violation. In distinguishing this *in-term* covenant case from those involving *post-term* covenants—i. e., covenants not to compete *after* employment or *after* the sale of a business—the court said (at p 310):

> "Here the restriction is limited to the period of service engaged for. The appellant left without cause and to enter the service of a rival. There was no acquiescence by appellee . . . . Clearly, under such circumstances no public policy would be violated in upholding the covenant. He is not deprived of the opportunity to obtain the means of subsistence or of giving to the public the benefit of his skill in the business to which he has been accustomed. He has only to perform the duty which he engaged to perform to render himself and his family comfortable. We know of no public policy which requires us to sanction the bald violation of a contract lest the public should be deprived of the peculiar skill of the appellant because he will not exercise that skill where he has engaged to exercise it."

The distinction between in-term and post-term covenants was similarly recognized in Saul v. Thalis, 156 F Supp 408, 411 (DCDC 1957), where the court stated:

". . . this case involves an agreement of employment for a fixed term containing a covenant which restricts the employee from engaging in a competing business during the term of employment fixed by the agreement. The validity of such covenant cannot be questioned so long as the employee remains in the employ of the employer."

In Good v. Modern Globe, Inc., 346 Mich 602, 78 NW2d 199 (1956), an employment contract provided that the employee, "for the above specified period [the term of employment] . . . will not, without prior written consent of the company, become employed, directly or indirectly, by any manufacturer of knitted goods or products presently manufactured by the company. . . ." The Michigan Supreme Court sustained the validity of this covenant, even though Michigan had a sweeping statute invalidating all contracts not to engage in business.* The court stated (at p 204):

"The plain language of this contract indicates that it is a contract of employment, not a contract whereby Good undertook not to engage in employment. A provision therein which forbade Good to become employed by any knitted goods manufacturer of products competitive to Globe's, is a provision which any employer would certainly have a right to contract for from any employee *for the duration of his employment.* The contract in question is not void under CL 1948, § 445.761, Stat Ann 28.61." (Emphasis supplied.)

* Mich Stats Ann § 28.61 (1948): "All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, *whether reasonable or unreasonable,* partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void." (Emphasis added.)

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In 1963, this court was squarely faced with the question of whether to follow or reject the "in-term—post-term" distinction, and we chose to follow it. McDonald's Systems, Inc. v. Sandy's, Inc., 45 Ill App2d 57, 195 NE2d 22 (1963). In McDonald's, the individual defendants had been granted a ten-year franchise by the plaintiff to operate a single drive-in restaurant in Urbana, Illinois. Paragraph 8 of the franchise agreement provided essentially as follows:

> "*During the effective term of this agreement*, Second Party [defendants] shall not, except with the consent of First Party [plaintiff], engage in any business the same as or similar to the business covered by this agreement at any place other than the premises heretofore described in the State in which said premises are located or at any place in a state contiguous to said State . . . ." (Emphasis added.)

Notwithstanding this covenant, the defendants, during the term of the franchise, organized a corporation to own and operate a similar drive-in restaurant in Peoria. In a suit brought by the plaintiff to enjoin the continued violation of the covenant and for damages, the trial court held that the restraint was unreasonably broad and that the covenant was therefore void. The opinion of this court reviewed the authorities discussed above (Harrison v. Glucose Sugar Refining Co. (supra); Saul v. Thalis (supra), and Good v. Modern Globe, Inc. (supra, at p 75)) and reversed the trial court, stating:

> "Under these and other authorities *the extent of the territorial restriction is a factor which affects the validity of a post-term covenant only.* In the instant case the covenant is an in-term, not a post-term, covenant, and *as long as appellees seek to avail themselves of the beneficial provisions of their franchise contract, they should not be permitted to dis-*

regard or refuse to abide by the several obligations they assumed. The contract was not of unlimited duration, and when the franchise term is ended, either by cancellations, or by the expiration of time, appellees are free to engage in similar business elsewhere without any franchise. There is nothing illegal in such an agreement, and the obligations of the respective parties should be respected and enforced." (Emphasis added.)

Other Illinois decisions have recognized the distinction between in-term and post-term covenants not to compete. In Ellis Electrical Laboratory Sales Corp. v. Ellis, 269 Ill App 417 (1933), the court upheld the agreement of a supplier of goods not to sell such goods to others during the term of the agreement. In Southern Fire Brick & Clay Co. v. Garden City Sand Co., 223 Ill 616, 79 NE 313 (1906), the Illinois Supreme Court upheld a lessor's covenant not to compete with his lessee during the term of the lease, notwithstanding that the restriction was statewide. In Match Corp. of America v. Acme Match Corp., 285 Ill App 197, 1 NE2d 867 (1936), the court enforced the defendant's promise that it would not, during the term of the contract, sell book matches in competition with the plaintiff, with no area limitation.

[8] Under the precedent thus established, we are constrained to hold that the covenant before us is valid and enforceable. The covenant of Mr. Stoner was unquestionably in-term during the first five years, since that was the duration of his employment contract with Vendo. It was within that period of time that he violated his covenant. During the post-employment period, or the additional five years, Stoner's activities were simply an affirmation of his prior violation—a retention of the fruits of his breach—and upholding his post-employment activities would be tantamount to our sanctioning his earlier breach. That the post-term aspects of the covenant might, if standing alone, be unnecessarily

broad, is therefore irrelevant to the disposition of this appeal. In any event, Stoner Investments, the corporation through which Stoner chose to exercise his breach, was his alter ego, and Stoner Investments entered into a covenant of its own which we characterize as in-term. The sale of assets to Vendo contemplated a ten-year relationship with Stoner Investments as well as with Mr. Stoner. The contract required Vendo to pay Stoner Investments, for a period of ten years from January, 1959, all profits in excess of $250,000 earned by Vendo from the assets sold. In addition, Stoner Investments was to be paid during this same ten-year period 25% of all monies Vendo was to receive from foreign production of products then under development by Stoner Investments. As we said in McDonald's (supra at p 75), during that period of time which defendants "seek to avail themselves of the beneficial provisions of their . . . contract, they should not be permitted to disregard or refuse to abide by the several obligations they assumed." Surely under these facts, and in view of the complete ownership of Stoner Investments by Stoner and his wife, and Stoner's complete dominion of the corporation, we must consider the covenants of each to be coextensive to be meaningful. In short, the sale of assets to Vendo represented a transaction which the parties contemplated would take ten years to consummate. The ten year restraints are therefore "in-term" under the teaching of McDonald's and other cases, and are valid and enforceable.

Defendants argue that the noncompetition clauses were not in fact violated by their conduct. They reason that the conduct complained of consisted only of paying salaries, making loans, furnishing sites and facilities, and holding stock, and that such activities, since not specifically prohibited, are authorized. Indeed, cases are cited for the proposition that the lending of money to plaintiff's competitor does not violate the lender's covenant not to compete (Battershell v. Bauer, 91 Ill App 181,

182 (1900); Sineath v. Katzis, 218 NC 740, 12 SE2d 671, 681 (1941); Gallup Elec. Light Co. v. Pacific Improvement Co., 16 NM 86, 113 P 848, 850 (1911)), that the granting of a lease to a competitor is likewise not tantamount to engaging in competition (Wineteer v. Kite (Mo App), 397 SW2d 752, 759 (1965); Ericson v. Jayette, 149 Fla 82, 5 So2d 453, 454 (1942)), and that both lending *and* leasing is not a violation of such a covenant (McKeighan Wachter Co. v. Swanson, 138 Wash 682, 245 P 10, 11 (1926)), affd 141 Wash 694, 250 P 353.

[9] Defendants, however, have done considerably more than merely make loans and leases to a competitor. They literally paid the salaries of the competitor and its employees, they furnished a building rent-free and guaranteed the loan by which the competitor could purchase another building from them, they took a sizeable amount of stock in the competing venture within days of the time they thought they could legally do so, and they made several large loans at no or low interest. Clearly, these activities show that defendants were closer than arm's length to the development of the Lektro-Vend machine. To suggest otherwise attributes a great deal of naiveté to this court. Even the cases cited by defendants are expressly limited to those situations where the defendant lender or defendant-lessor does not encourage and has no interest in the business of the competitor. E. g., Gallup Elec. Light Co. v. Pacific Improvement Co. (supra at p 851); Sineath v. Katzis (supra); McKeighan Wachter Co. v. Swanson (supra); Wineteer v. Kite (supra).

We sustain the trial court's finding that defendants' activities amounted to the direct or indirect entering into or engaging in the vending machine business.

The Assessment of Damages

As noted above, the trial court entered judgment against Stoner and Stoner Investments for $1,100,000, and against Stoner alone for $250,000. The larger judg-

ment was based upon evidence tending to show that the value of the Lektro-Vend machine was approximately $1,500,000 that Stoner himself believed this to be what the machine was fairly worth and that the approximate cost necessary to develop such a machine would be $400,000. The machine thus represented a potential profit to its developers, as it then stood, of $1,100,000. The $250,000 judgment represented a return of the entire salary Stoner received during his five years of employment by Vendo.

Although the judgment order did not specifically apply these judgments between the two theories of recovery set forth in Vendo's complaint, as amended, the briefs and arguments of the parties in this court have treated the $1,100,000 judgment as arising out of the trade secret theory, and the $250,000 as applicable to the breach of the covenants not to compete. We agree that this appears to have been the reasoning of the trial court.

Our conclusion that Vendo has not proven a theft or appropriation of a trade secret precludes any recovery on that theory. We are thus limited to ascertaining the proper measure of damages for the breach of the covenants not to compete.

[10] At the outset, we agree that such a breach of Stoner's fiduciary undertaking as an employee in the instant case requires a forfeiture of salary during the period that the breach was occurring. Ely v. King-Richardson Co., 265 Ill 148, 153, 106 NE 619 (1914); National Lock Co. v. Aldeen, 271 Ill App 37, 40 (1933); Evangelista v. Queens Structure Corp., 27 Misc2d 962, 212 NYS2d 781 (1961); Harry R. Defler Corp. v. Kleeman, 19 App Div2d 396, 243 NYS2d 930, 938 (1963). In fact, none of the parties seriously question this general rule, their main dispute being to define the period of the breach. Plaintiff contends that the breach began immediately after the signing of the sales and employment agreements, but before the take-over, when Stoner spoke to the busi-

ness representative of the union representing the plant employees for the alleged purpose of frustrating the sale. Plaintiff thus urges that all of Stoner's salary during his five-year employment, or $250,000, should be recoverable. Defendants, on the other hand, contend that even if a breach existed, it cannot be traced prior to about January, 1961, the time when defendants began making loans to Rod Phillips. It is our opinion that defendants' view is the more reasonable in this respect.

Nothing came of Stoner's brief conversations with the union representative, even construing them in their worst light, and we attach no legal significance to them. We have more trouble justifying the events of mid-1960, when Bill Phillips began receiving financial aid from defendants to develop his electronic coin detecting device. Even here, however, we cannot conclude that Stoner's activities were a part of his overall breach. A coin detecting device has so many uses outside the vending machine industry (slot machines, coin counters for busses and telephone companies, toll road collectors, parking meters, etc.), that its development is not necessarily a step toward "engaging" in such industry. In any event, this detector was never built or put to use, and its development, as far as the record discloses, did not contribute materially to the evolution of the Lektro-Vend machine. Defendants' breach, therefore, originated at the end of 1960 or in the beginning of 1961, when the extensive loans to Rod Phillips started, when defendants began paying salaries to Rod Phillips' employees, when the Middle Avenue Building was made available for the Phillips' use, and, in short, when the first breaths were blown into the Lektro-Vend machine.

When did the breach end? Defendants say the breach, assuming it existed at all, ended in December, 1962. But defendants would have us overlook the fact that in 1963 they gave the Phillipses the use of the Sullivan Road Plant, and in 1964 they in effect guaranteed the loan

which enabled the Phillipses to purchase this plant. This transaction was completed within a few weeks of the end of Stoner's employment contract.

In view of the foregoing, we are of the opinion that the defendants' breach lasted throughout 1961, 1962, 1963, and through May, 1964, a total of approximately three years and five months. Inasmuch as this cause will be remanded for reasons stated below, the trial court will be in a position to make a more precise determination as to the period of the breach and salary forfeiture, having this opinion in mind.

[11, 12] In addition to the recovery of the salary paid Stoner during the breach, Vendo would be entitled to recover any damages to its business occasioned thereby. This would be the measure of lost profits to Vendo during the period of the breach, plus the diminution of its business at the end of the period covered by the covenants. Mirkovich v. Maravich, 206 Ill App 463 (1917) (Abst). Other Illinois decisions holding that the measure of damages in such a case is the provable loss to the covenantee, and not the gain accruing to the covenantor by reason of his breach, include Henry's Drive-In, Inc. v. Anderson, 37 Ill App2d 113, 125, 135 NE2d 103 (1962); Stewart v. Challacombe & Ramsey, 11 Ill App 379, 383 (1882); Bauwens v. Goethals, 187 Ill App 563, 567, 568 (1914). See also the annotation in 127 ALR 1152 (1940), where cases from all jurisdictions are cited in support of this general rule.

Conceding the difficulty of ascertaining such damages, we repeat what was said in Stewart v. Challacombe & Ramsey (supra, at p 382):

> "This difficulty [of ascertaining damages] has long been recognized, and it is for this reason that courts of equity interfere by injunction to restrain parties from entering into trade in violation of such contracts, and for the same reason it has become usual to insert in such agreements a sum certain to be

paid in case of violation, as liquidated damages. Such considerations, however, cannot authorize a change of the fundamental rules of law. As was said in Terry v. Eslora, 1 Porter, 273, such difficulties 'are intrinsic in the subject about which the parties have chosen thus loosely to contract.' "

The foregoing language was cited favorably in Bauwens v. Goethals (supra, at p 569), where the court added:

"A party may not sell a prospect for a valuable consideration received and on breach of his contract defend on the ground that the subject-matter is of too uncertain value to permit its measurement in a court of law."

Applying these precedents to the case before us, we see that the value of the Lektro-Vend machine, which the trial court found to be $1,100,000 after deducting estimated development costs, is neither an element nor a yardstick of damages for a breach of the noncompetition covenants. While this figure may represent the gain to Stoner and his associates, it does not necessarily reflect the damage to the plaintiff. We hold instead that Vendo should be permitted to recover an amount equal to the net profits it lost and might reasonably be expected to lose, plus the amount by which the value of its business will have been diminished as of June 1, 1969, because of defendants' wrongful competition.

[13] On remand, the trial court should determine the extent of these damages. To the extent that the record is wanting of proof on this issue, the court below will entertain further evidence of such damages. A similar situation developed in the appeal of Henry's Drive-In, Inc. v. Anderson (supra, at p 128), where it was said:

"Where a material question is in controversy upon a material issue and the record discloses that all

the evidence on that issue has not been produced, this court has the power to reverse the judgment and remand the cause for the taking of further evidence, on the part of either or both of the parties, upon the issues. [Citing cases.] In this case the judgment must be reversed and the cause remanded to the trial court in order that loss of net profits may be proved."

[14] Defendants argue that no damages whatsoever can be assessed against Mr. Stoner, even if he were found to have breached a valid noncompetition covenant, because the employment contract provided that Vendo "shall have the right to terminate this agreement upon thirty (30) days' notice in the event of the substantial violation of the terms hereof by Stoner." Thus, defendants maintain that this provision constitutes an implied waiver by Vendo of its right to damages in the event of a breach, and that Vendo in effect agreed that its only remedy for a substantial breach would be termination of the employment contract. We cannot accept this argument. We see nothing in the contract to suggest that Vendo intended to waive its remedial rights by expressing its right to terminate an employment contract breached by its employee, a right that it would have even without such a provision. Suppose Stoner had literally stolen a large amount of cash from Vendo; would defendants argue that Vendo's only remedy would be to discharge Stoner, and that it would have no right to recover the stolen cash?

The Injunctive Relief

The injunctions granted below restrained Stoner and Stoner Investments "from engaging, directly or indirectly" in the vending machine business until June 1, 1969, in the United States or any foreign country in which Vendo engaged in such business as of the date of the acquisition of the Stoner plant.

[15] In opposition to this injunctive relief, defendants first argue that there were no allegations or proof as to Vendo's irreparable damage. As respects defendant Stoner, however, we believe a sufficient allegation of irreparable damage is made in paragraph 9 of the complaint, which provides:

> "9. That unless restrained by an Injunction of this Court, the defendant, Harry B. Stoner, will continue at his engagement in the foresaid enterprises and cause continuing irreparable damages to the plaintiff, The Vendo Company, and will cause the plaintiff irreparable damages in the future."

The complaint also prays for injunctive relief against defendant Stoner.

[16] On the other hand, Count II of the complaint, directed against Stoner Investments, is totally silent both as to an allegation of irreparable damage and as to a prayer for injunctive relief. As long as decisions of this court have been reported, it has been held that "a party . . . seeking relief by way of injunction, must specifically pray for such relief, otherwise the court will not aid him." Willett v. Woodhams, 1 Ill App 411, 413 (1877). Inasmuch as plaintiff has made no motion to amend either the allegations or the prayer of its complaint in these respects, the court erred in ordering an injunction against the corporate defendant.

[17, 18] As against the individual defendant, Mr. Stoner, we conclude that the injunctive relief was justified. The evidence showing that Lektro-Vend machine's impact on the vending machine industry, coupled with the proof of Stoner's influence in the development of that machine, is ample to warrant the finding, implicit in the issuance of the injunction, that Vendo suffers actual or threatened irreparable injury from Stoner's wrongful activities. Further, we are of the opinion that the scope of the injunction granted is reasonable in light

of the evidence adduced at the trial, and is consistent with the allegations and prayer of the complaint. The restraint imposed by the injunction is no more broad than the restraint imposed by Stoner's employment contract, and since we have already concluded that the latter is reasonable in view of the facts before us, we must conclude that the injunction is equally reasonable.

In any event, the injunction is not now in force by reason of the failure to file a bond, and by its terms is to terminate on June 1, 1969. In these circumstances, further comment on this aspect of the appeal is at best gratuitous.

The Antitrust Defenses and Counterclaim

By way of affirmative defense, it was alleged that the contracts sued upon violated the Illinois and Federal Antitrust laws and were therefore invalid and unenforceable. Defendants also counterclaimed under the Illinois Antitrust laws for treble damages. The trial court, reasoning that a state court has no jurisdiction to hear a federal antitrust defense, struck the defense founded on the federal statutes. The defense and counterclaim based on the Illinois Antitrust law of 1891, which was in force at the time of the contract between the parties, was stricken on the theory that the statute related only to agreements to fix prices and production, neither of which was alleged in these proceedings, and also because the commerce involved was interstate rather than intrastate. The 1965 Illinois Antitrust law was held inapplicable for the additional reason that it had not been enacted until after execution of the agreements sued upon.

In our review of the striking of these pleadings, we shall consider first the defense asserting the federal laws, and thereafter the defense and counterclaim based on the Illinois statutes.

The Federal Antitrust Defense

[19] It was held below that the Illinois courts are without jurisdiction to consider a defense created by the federal antitrust statutes. We are aware of no Illinois precedent which would support this holding. On the contrary, it appears that the Illinois courts have on more than one occasion passed upon the merits of a defense based on the federal antitrust laws.

In Corn Products Refining Co. v. Oriental Candy Co., 168 Ill App 585 (1912), a contract provided that the plaintiff would, on December 31, deliver a price rebate to the defendant if the latter purchased all of its annual requirements of unmixed corn syrup from the plaintiff. On December 24, the defendant unilaterally deducted the amount of such rebate from a payment due plaintiff. The plaintiff brought suit for the amount of the deduction, alleging that the defendant had purchased certain of its syrup requirements from others, and that in any event the rebate was not earned until December 31. As a defense, defendant alleged that the plaintiff was a monopoly in restraint of trade in violation of federal and Illinois law. Although affirming a decision in favor of the plaintiff, the court observed at page 589:

> ". . . if it be a fact that defendant in error was and is an unlawful combination and had violated the Federal Anti-Trust Laws, as charged by plaintiff in error, such fact would not defeat the defendant in error in its suit for the recovery of the purchase price of property sold by it under a contract collateral to such wrong committed by it. In order for such a defense to prevail, the contract sought to be enforced must have been made to further the objects of the illegal combination. This was the rule under the common law, and it is also the rule under The Federal Anti-Trust Law, as declared by

> the Federal Courts, and by those decisions the courts of this state are bound."

The holding of the Corn Products case is that where the contractual provision sued upon is itself a violation of the federal statutes, the Illinois courts will entertain such a defense, but that the antitrust defense does not afford a defense where it is collateral to the provision sued upon. In any event, the mere fact that the defense is predicated on the federal statutes does not in itself deprive the state court of jurisdiction to hear and pass upon it.

Merchants Service Corp. v. Libby, McNeill & Libby, 314 Ill App 121, 40 NE2d 835 (1942), is another case supporting our view that the court below erred in striking the federal antitrust defense on the pleadings. There, in a suit for unpaid brokerage commissions, the defense asserted that the payment of the commissions would violate the Robinson-Patman Act, the federal law prohibiting certain pricing discriminations. While the contract between the parties predated the federal act, the sales giving rise to the disputed commissions were made after the legislation. The court stated that the principal question was the applicability of the statute where the sales contracts were initiated before and the sales completed after the effective date of the act. After holding that Congress intended to cover such transactions, and that this would not violate the Constitutional prohibition against the impairment of contracts, the court reversed the trial court and entered judgment in favor of the defendant, saying at page 129:

> ". . . defendant could not pay and plaintiff could not receive or accept the commissions or price discounts for which this action is brought without violating the plain provisions of the Robinson-Patman Act."

See also, Cummings-Landau Laundry Mach. Co. v. Koplin, 316 Ill App 306, 44 NE2d 613 (1942) (Abst), affd in part and revd in part on other grounds, 386 Ill 368, 54 NE2d 462 (1944).

On the strength of the foregoing Illinois authorities, in opposition to which the plaintiff has not cited a single Illinois case, we hold that the trial court erred in striking the federal antitrust defense without a hearing. Plaintiff's reliance on Bruce's Juices, Inc. v. American Can Co., 330 US 743 (1947), is misplaced, since that decision in no way considered a state court's jurisdiction to hear and adjudicate a federal antitrust defense to a contract action. Instead, that case dealt only with the specific remedies afforded by the Robinson-Patman Act, and in no way distinguished between the jurisdiction of the federal and state courts.

The Illinois Antitrust Defenses and Counterclaim

[20] The principal question here is not whether the Illinois Antitrust laws have been violated, but instead whether the interstate nature of the parties' businesses renders these state laws inapplicable under the doctrine of federal preemption. If the question be resolved in the negative, it would be necessary to consider the merits of the defenses and counterclaim based thereon.

We believe that Kosuga v. Kelly, 257 F2d 48 (7th Cir 1958), affd 358 US 516 (1959), rehearing den, 359 US 962, is dispositive of this question in favor of plaintiff. In Kosuga, the plaintiff brought suit for the purchase price of onions sold by it to the defendant. The allegation that the contract violated the Illinois Antitrust laws was pleaded as an affirmative defense. The District Court struck this as well as other defenses, and entered judgment in favor of the plaintiff. In affirming the striking of this defense, the Court of Appeals announced at page 55:

THE VENDO CO. v. STONER
105 Ill App2d 261

> ***"The Illinois Act as the substantive law of the State is applicable only to intrastate commerce.*** Defendant apparently so recognizes and argues that such commerce was involved inasmuch as the contract of sale was made and was to be performed in the State of Illinois. Defendant makes this argument in spite of the frequent allegations in his pleadings that 'said onions which were the subject of said agreement and contract were a part of interstate commerce.' In 15 CJS Commerce § 133(b), it is stated that 'state anti-trust laws do not apply to transactions involving interstate commerce . . . .' *It is hardly open to doubt but that the transaction in issue involved interstate commerce. It is, therefore, our view that the Illinois Act is without application."* (Emphasis added.)

Nowhere have defendants pleaded or argued that the commerce involved here is anything but interstate. Indeed, the business covered by the contracts before us is not only interstate, it is international. It follows, under the doctrine announced in Kosuga, that the trial court properly struck the affirmative defenses and counterclaim founded on alleged violations of the Illinois Antitrust laws.

It should be noted that defendants attempted without success to distinguish Kosuga by arguing in their brief that "the only reason the Seventh Circuit held the Illinois Anti-Trust Act inapplicable was because it *was not* pleaded as a defense to the action." (Emphasis in original.) Not so. The opinion of that court specifically states in at least two passages that the defendant's reliance on the Illinois Antitrust laws was before the court by way of "affirmative defense." (See pages 50, 55.) We read nothing in the opinion to suggest that this defense was not pleaded, contrary to defendants' assertion without citation.

Our conclusion that the Illinois Antitrust laws are inapplicable renders unnecessary any discussion as to the interpretation of these laws and the remedies which they provide either by way of counterclaim or affirmative defense.

For the above reasons, the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with the views expressed herein.

Affirmed in part, reversed in part, and remanded.

MORAN, P. J. and ABRAHAMSON, J., concur.

APPENDIX C

NOTICE OF ORDER FROM CLERK
OF THE ILLINOIS SUPREME COURT
DENYING PETITION FOR LEAVE
TO APPEAL ON SEPTEMBER 25, 1969

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

JUSTIN TAFT
CLERK

September 25, 1969

Mr. Barnabas F. Sears
Attorney at Law
33 North LaSalle Street
Chicago, Illinois 60602

SEP 2

Dear Mr. Sears:

In Supreme Court today, in case No. 42157

entitled: The Vendo Company, a Missouri corporation, petitioner

vs.

Harry B. Stoner, et al., etc., respondents

Petition for Leave to Appeal was: DENIED.

Very truly yours,

Justin Taft

Clerk of the Supreme

APPENDIX D

SECOND OPINION AND JUDGMENT OF THE TRIAL COURT ENTERED AUGUST 13, 1971

C641 This cause coming on to be heard on the remand from the Appellate Court of the Second District, in accordance with the Mandate of that Court filed herein and being guided by the Opinion of the Appellate Court (*The Vendo Co.* v. *Stoner*, et al., 105 Ill. App. 2d 261), which Opinion and Mandate are the law of this case, and referring particularly to the language of the Ap-

pellate Court as found on pages 290 and 291 of said opinion, this trial court will not go into detail as to all of the cases cited by Counsel on both sides in the respective motions and briefs and oral arguments.

But this trial court, constantly laboring in the vineyard of litigation and being fully aware of our adversary proceedings with all Counsels' desire to win for their respective clients, is fully aware that none of the spoken words of the witnesses in print will ever
C642 portray the feelings, animosity, and almost venom that the Court's attaches and the trial judge witnessed, the hostility that prevails in many cases; and in this case even to observe one defense witness: namely, John Brothers, who had documented his testimony and was reading from his notes, could but give one firm impression to this trial judge, that notwithstanding the trial court's original hearing of the testimony and findings, the Appellate Court's affirmation of liability, the refusal of the Supreme Court to accept the appeal leaves the trial court with one definite conclusion: That notwithstanding the aforesaid is the defendants' desire to relitigate the question of liability. The only saving feature for the trial judge is the factor that Counsel for the defendants, as well as Counsel for the plaintiff, being officers of this Court, did exercise the expertise of competent Counsel, even though the defendant and defendant's witnesses wanted to relitigate liability previously fixed.

Counsel for the defendant and defendants, as officers of the Court, waited until the last moment before this remand hearing commenced, although the case had been set at numerous times at Defense Counsels' convenience, to finally announce to the trial court that

the defendants were withdrawing their Sixth Affirmative Defense, which point is forcibly brought out on page 38 of the oral argument, wherein Defense Counsel
C643 and the trial court discuss the Sixth Affirmative Defense. And it would appear that Defense Counsel agrees with the trial court on that particular defense, thereby leaving the question of liability and damages on three points, again referred to on pages 290 and 291 of the aforesaid Appellate Court Opinion.

And this Court, as it appeared in one of the cases cited by Plaintiff, quoting Defense Counsel referred to the instruction found in practically all civil cases:

> "In considering the evidence in this case, you are not required to set aside your own observation and experience in the affairs of life, but you have a right to consider all of the evidence in the light of your own observation and experience in the affairs of life."

And having admitted the testimony of experts in this case and in the case entitled Merchants National Bank of Aurora, Appellee, v. The Elgin, Joliet & Eastern Railway Company, et al., Appellants, in which the Appellate Court affirmed this trial judge and to find the Supreme Court likewise affirmed the Appellate and Trial Courts on the admission of expert testimony, and having considered the evidence offered, while not being in full accord with the Appellate Court's directive as to the length of time of the Defendant Stoner's breach of his contract, but feeling bound by the Appellate Court directive, This Court Does Find from a preponC644 derance of credible evidence as to each item of damage in favor of the Plaintiff, The Vendo Company, and that the Plaintiff, The Vendo Company, sustained

damages to its business occasioned by Stoner and Stoner's alter ego, Stoner Investments, breach as follows:

(1) The salary forfeiture is the sum of $170,835.00;

(2) That the loss of profits to the Plaintiff Vendo during the period of the breach and by the reason thereof are $2,135,000.00; and

(3) That the diminution in the value of Vendo's business as of June 1, 1969, by reason of the breach is $5,210,500.00.

Whereby It Is Ordered, Adjudged And Decreed as follows:

(1) That the Plaintiff Vendo Company does have and recover of the Defendant Harry B. Stoner the sum of $170,835.00;

(2) That the Vendo Company does have and recover of the Defendant Harry B. Stoner and Stoner Investments, Inc., a corporation, the sum of $7,363,500.00; and

(3) That the Plaintiff Vendo Company does have and recover its costs as to each judgment aforesaid C645 and that execution issue forthwith.

Entered: August 13, 1971.

/s/ John S. Petersen
Judge

THE VENDO COMPANY, Plaintiff-Appellee, v. HARRY B. STONER *et al.*, Defendants-Appellants.

(No. 71-396; Affirmed in part, reversed in part, and remanded.)

Second District—May 29, 1973.

Rehearing denied September 12, 1973.

1. APPEAL AND ERROR (§ 2031)—*when proceedings of trial court on remand must conform to judgment of reviewing court.*

On reversal of judgment and remand by court of appellate jurisdiction trial court can take only such proceedings as conform to judgment of reviewing court.

2. DAMAGES (§ 50)—*what constitutes lost profits—noncompetition case.*

Lost profits in a noncompetition case are those which were divested from plaintiff as a result of defendant's sales as plaintiff's competitor and plaintiff's damages must be such as were sustained by defendant's breach of contract and were a normal and proximate consequence of the breach.

3. DAMAGES (§ 5)—*liberality in estimating damages does not extend to proof.*

Although liberality may be used in estimating damages after it has been shown that they were caused by illegal acts, the liberality does not extend to proof that damages were caused by the illegal acts.

4. DAMAGES (§ 69)—*measure of diminution of value of business—noncompetition covenant.*

Diminution in the value of the business is the amount by which value of good will of business has been impaired at the end of term of the noncompetition covenants.

5. DAMAGES (§ 313)—*when recovery will be limited to nominal damages—breach of noncompetition covenant.*

In action to recover damages for defendant's breach of noncompetition covenants, if plaintiff failed or was unable to prove any lost profits or diminution of business because of defendant's wrongful competition it would be entitled to recover only nominal damages.

6. COMBINATIONS AND MONOPOLIES (§ 1.10)—*when amendment to Antitrust Act is not retroactive.*

Amendment to Illinois Antitrust Act has no retroactive application to contracts entered into five years earlier. (Ill. Rev. Stat. 1969, ch. 38, par. 60—7.9).

APPEAL from the Circuit Court of Kane County; the Hon. JOHN S. PETERSEN, Judge, presiding.

Barnabas F. Sears, of Boodell, Sears, Sugrue & Crowley, and James E. S. Baker, of Sidley & Austin, and William Thomas Braithwaite all of Chicago, and Gerald M. Sheridan, Jr., of Wheaton, for appellants.

Reid, Ochsenschlager, Murphy & Hupp, of Aurora, and Hillix Brewer & Meyers, of Kansas City, Missouri, for appellee.

Mr. JUSTICE ABRAHAMSON delivered the opinion of the court:

Plaintiff ("Vendo") brought this action in August 1965 in the circuit court of Kane County to recover damages for defendants' breach of non-competition covenants. By amendments to the complaint filed a few months later, Vendo alleged theft by defendants of valuable trade secrets and appropriation of them to their own use and to that of Lektro-Vend Corporation. Following a bench trial the court entered judgment against both defendants, Harry Stoner ("Stoner") and Stoner Investments, Inc. ("Stoner Investments") for $1,100,000 and costs and against Stoner for $250,000. (An injunction was also entered which is not now an issue.) On appeal, after holding that Vendo had no trade secret and was therefore not entitled to any damages for its theft, we affirmed in part, reversed in part, and remanded the case to the trial court with directions to determine damages for breach of the covenants not to compete consistent wtih the views expressed in our opinion. *Vendo Co. v. Stoner*, 105 Ill.App.2d 261.

At the conclusion of the trial on remand the court entered judgment against both defendants for $7,345,500 and costs and against Stoner, individually, for $170,835 and costs.

Our opinion on the prior appeal presents the relevant facts and sets forth the pertinent non-competition provisions of the sales agreement and the employment contract. (*Vendo Co. v. Stoner*, 105 Ill.App.2d at 267-268.) Therefore they need not be restated here. However, we will advert in this opinion to evidence adduced at the trial on remand.

The principal question presented is whether the judgment against both defendants for $7,345,500 is contrary to the law of the case established by the prior appeal, and whether it is outside of the issues framed by the complaint.

It would unduly prolong this opinion to set forth in detail the evidence as to damages received by the court (over defendants' objections).[1] We will confine ourselves to summarizing the evidence when necessary. Perhaps the nature of Vendo's evidence as to damages on remand can best succinctly indicated by Vendo's counsel's own words in his opening statement as being: (a) "What Vendo lost by way of sales by not having this (Lektro-Vend) machine, if that resulted from the conduct of Mr. Stoner," and (b) "the depreciation—or the diminution of the value of

[1] The record in this case is voluminous; the abstract of the record alone of the trial on remand consists of 598 pages; the book of exhibits on re-trial is about 3 thick.

the company as of 1969 as a result of Mr. Stoner's activity and the failure to have the Lektro-Vend machine if that resulted from Mr. Stoner's activity."

In its complaint Vendo pleaded two theories of liability: (a) theft of a trade secret, and (b) breach of the covenants not to compete by directly or indirectly entering into the vending machine business through Lektro-Vend. In the first appeal we held that Vendo had no trade secret, and that the judgment which was predicated upon the theory of its theft was erroneous. However, we held that the non-competition covenants were valid and that they were breached by defendants, stating: "We are thus limited to ascertaining the proper measure of damages for breach of the covenants not to compete." (*Vendo Co. v. Stoner*, 105 Ill. App.2d at 288.) We further stated at page 291: "[T]he value of the Lektro-Vend machine, [upon which the earlier judgment of $1,100,000 was based] • • • is neither an element nor a yardstick of damages for a breach of the noncompetition covenants," and held instead that "Vendo should be permitted to recover an amount equal to the net profits it lost and might reasonably be expected to lose, plus the amount by which the value of its business will have been diminished as of June 1, 1969, because of defendants' wrongful competition."

At the trial on remand Vendo made no attempt to prove lost profits caused by defendants' "wrongful competition". Instead, it relied principally on the testimony of two experts, both of whom acknowledged that their theory for the computation of damages was loss of sales from the absence of a FIFO [2] machine and that Stoner was responsible for Vendo's lack of such machine. These experts relied substantially on a report made by Vendo's manager of business research making estimates of percentage of the confection vendor market taken over by FIFO vendors as distinguished from the older drop-shelf type. This very report warned that it did not include a sufficient number of operators to make a determination, and that therefore "inferences concerning competitive positions within the total market should be avoided." The figures of both experts on lost profits and on diminution of the value of the business were premised on Vendo's failure to have FIFO, and on Stoner's responsibility for such failure.

Neither the evidence in the first trial nor in the trial on remand establishes that Stoner was responsible for Vendo's failure to have FIFO. Our prior opinion describes Vendo's unsuccessful efforts to build a FIFO in 1959-60 (*Vendo Co. v. Stoner*, 105 Ill.App.2d at 271-273), and, at page

[2] FIFO equals "first-in-first-out", *i.e.*, a machine where the first product stocked would be the first one sold.

274, Stoner's recommendation in March 1963 for Vendo's purchase of Lektro-Vend's FIFO machine. When Stoner's recommendation was rejected, he told Vendo that the future will show that Vendo's failure to acquire it was "a serious mistake". Vendo had decided against developing a FIFO twice before that occasion.

After 1963 Vendo continued to reject the development of a FIFO machine, even after repeated urging by its salesmen. At the time of the trial on remand, April-May, 1971, Vendo was finally almost ready to begin production with a FIFO snack vender. This development resulted as a spin-off from its contract with Lance Company, a large buyer of vending machines on a bid contract basis.

● 1 Vendo's failure to have a FIFO vending machine is not attributable to defendants. The computation of damages for a loss of profits during defendants' breach and the diminution in the value of its business was not based on defendants' "wrongful competition" and therefore did not conform to the decision and mandate of this court. (*Vendo Co. v. Stoner*, 105 Ill.App.2d at 291.) On reversal of a judgment and remand by a court of appellate jurisdiction the trial court can take only such proceedings as conform to the judgment of the reviewing court. *People ex rel. Bauer v. Henry*, 10 Ill.2d 324; *Berry v. Lewis*, 27 Ill.2d 61, 62-63; *Fiore v. City of Highland Park*, 93 Ill.App.2d 24, 34.

● 2, 3 Lost profits in a non-competition case are those which were diverted from the plaintiff as a result of defendants' sales as plaintiff's competitor (*Long v. O'Bryan*, 28 Ky. L.Rep. 1062, 91 S.W. 659, 660; *Stewart v. Challacombe & Ramsey*, 11 Ill.App. 379, 382), and plaintiff's damages must be such as were sustained by defendant's breach of contract and were a "normal and proximate consequence of the breach • • •." (*Hitchcock v. Anthony*, 83 F. 779, 783.) Although liberality may be used in estimating damages after it has been shown that they were caused by illegal acts, "this liberality does not extend to proof that the damages were caused by the illegal acts." (*Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326, 330, *cert. denied*, 372 U.S. 970.) The fact that Vendo suffered losses subsequent to defendants' breach of the non-competition covenants does not of itself establish a causal connection. The damages recoverable by Vendo are only those which are a normal and proximate consequence of defendants' breach of those covenants.

● 4, 5 Diminution in the value of the business is the amount by which the value of the good will of the business has been impaired at the end of the term of the non-competition covenants. (*Bauwens v. Goethals*, 187 Ill.App. 563, 572; see also, *McCook Window Co. v. Hardwood Door Corp.*, 52 Ill.App.2d 278, 287-288.) If upon remand Vendo fails or is unable to prove any lost profits or diminution of business "because of de-

fendants' wrongful competition" it would be entitled to recover only nominal damages. *Maren v. Wolmer*, 343 Ill.App. 353 (abstract opinion); *Scotton v. Wright*, 32 Del. 192, 121 A. 180, 185; *Shaw v. Jones, Newton & Co.*, 133 Ga. 446, 66 S.E. 240, 242.

A further contention of defendants is, in effect, that because of additional facts adduced after remand, the judgment of $170,835 entered against Stoner individually is erroneous. A discussion of defendants' argument will not serve any useful purpose and would only prolong this opinion. We need only state that in entering that judgment the trial court complied with our mandate on the prior appeal as it was bound to do. (*Sawicki v. Clemons*, 411 Ill. 28, 30; *People v. Militzer*, 301 Ill. 284, 287.) Defendants had ample opportunity to introduce at the first trial any pertinent evidence relative to the facts upon which that liability was predicated. They did not do so. There must be an end of litigation somewhere and the judgment of $170,835 is affirmed.

Defendant further argues that the trial court (before the trial on remand) should have allowed defendants' motion to reinstate their Illinois antitrust defenses and counterclaim. In our prior opinion we affirmed the trial court's striking of these affirmative defenses and counterclaim bounded on alleged violation of Illinois antitrust laws. (*Vendo Co. v. Stoner*, 105 Ill.App.2d at 298-299.)[3] Subsequent to this court's prior opinion the Illinois legislature enacted section 7.9 amending the Illinois Antitrust Act, effective July 1, 1969 (Ill. Rev. Stat. 1969, ch. 38, sec. 60—7.9) to provide as follows:

> "No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce."

The Attorney General of Illinois, as *amicus curiae*, supports plaintiff's argument on this point.

● 6 Even if it be assumed that the State legislature had the authority to enact this amendatory provision, we are unable to ascribe to it retroactive application to contracts entered into five years earlier. Our affirmance in the prior opinion of the trial court's dismissal of the State antitrust defense and counterclaim became the law of the case on remand. The trial court properly refused to allow reinstatement of the defense and counterclaim based on the amendment of the Illinois Antitrust Act.

In view of our decision we regard it as unnecessary to discuss other contentions of the parties.

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[3] In that opinion we also held at page 297 that the trial court erred in striking the federal antitrust defenses without a hearing. Before trial on remand defendants by leave of court dismissed that defense without prejudice. *Vendo Co. v. Stoner*, 105 Ill. App.2d 261, 297.

The judgment of the trial court is therefore affirmed in part, reversed in part, and remanded for further proceedings consistent with the views expressed herein.

Affirmed in part, reversed in part, and remanded with directions.

GUILD, P. J., and T. MORAN, J., concur.

APPENDIX F

FINAL OPINION OF THE ILLINOIS SUPREME COURT

(No. 46228, 46231 cons.—Appellate court reversed; circuit court affirmed.)

THE VENDO COMPANY Appellant and Appellee, v. HARRY B. STONER *et al.*, Appellants and Appellees.

Opinion filed Sept. 27, 1974.—Modified on denial of rehearing Nov. 27, 1974.

1. CORPORATIONS—*a director-officer violates his fiduciary duties when he gives substantial financial support to the development of a competitor.* A director and officer of a vending-machine company violates his fiduciary duties to his employer when he contributes substantial financial support, either directly or indirectly, to the development of a superior vending machine that would be competitive with an older and less satisfactory model produced by

his employer. (P. 303.)

2. SAME—*a director-officer's breach of fiduciary duties is not excused by his relatively inactive role in the corporation.* The failure of a corporation to make the best use of a director-officer's abilities does not release that person from his duty not to assume a position which would be adverse to that of his employer. (P. 304.)

3. SAME—*a director-officer breaches his fiduciary duty by failure to disclose fully his involvement with a potential competitor.* Where an officer and director of a vending-machine corporation is asked by his employer to inquire as to the possibility of purchasing the design of a competing vending machine which is being developed by others, it is a breach of fiduciary duty for the officer-director not to fully disclose the extent of his previous association and financial support for the persons developing the competing vending machine. (P. 304.)

4. SAME—*damages for breach of fiduciary duty are not limited to the profits resulting from the breach.* The damages resulting from a breach of fiduciary duty are not limited to the profits resulting from the fiduciary having breached his duty. (Pp. 305-06.)

5. APPEAL AND ERROR—*the doctrine of the law of the case is not applicable to the supreme court when reviewing an appellate judgment.* The doctrine of the law of the case is not applicable to the supreme court in reviewing the judgment of the appellate court in the same case. (P. 306.)

6. SAME—*an appellee may defend the judgment below on any ground appearing of record.* When an appeal is taken, the appellee may defend the judgment below on any grounds appearing of record. (P. 307.)

7. CORPORATIONS—*covenants not to compete were breached when the covenantor provided aid to a developing competitor.* The activities of an officer-director of a vending-machine corporation toward the development and, thereafter, the marketing of a competing vending machine, consisting of substantial financial aid and the provision of physical facilities, as well as the officer's ownership interest in the competing enterprise, were so substantial as to go beyond the limits established by covenants not to compete contained in a sales contract and an employment contract entered into by such officer-director. (P. 308.)

8. STATUTES—*statutes will ordinarily not be construed to be retroactively applied.* Statutes will ordinarily not be construed so as to produce retroactive application, absent some clear expression of an intention to do so, and this rule is particularly applicable, for constitutional reasons, where a criminal statute is involved. (P. 310.)

9. ANTITRUST *the Illinois Antitrust Act is not to be applied retroactively.* The Illinois Antitrust Act, including the section thereof creating a right in private parties to bring a civil suit for damages, is not to be applied retroactively. (P. 310.)

10. CORPORATIONS *indirect proof is permissible to establish loss of profits from exclusion from a market breach of fiduciary duty.* Loss of profits, whether past or future, claimed to arise out of exclusion from a market is customarily not susceptible of detailed or direct proof, and proof of an inferential character is permitted to establish such lost profits as well as to establish lost profits arising from a violation of fiduciary obligations or breach of contract. (Pp. 310-11.)

11. APPEAL AND ERROR *trier of fact's assessment of damages will not be disturbed unless manifestly erroneous.* The assessment of damages by a trial court sitting without a jury will not be set aside unless it is manifestly erroneous. (P. 311.)

12. CORPORATIONS *a corporation may recover lost profits and damages from diminution in business resulting from breaches of fiduciary duty and covenants not to compete.* Where an officer-director of a vending-machine corporation has breached his fiduciary duty to the corporation and has also breached covenants not to compete, the corporation may recover its lost profits and the diminution in the value of its business attributable to such breaches, and damages for lost profits may extend beyond the period following the expiration of the covenants not to compete because the damages are also based on the breach of fiduciary duty. (Pp. 311-13.)

13. SAME *a director-officer's salary is properly forfeited during the period of his breach of fiduciary duties.* A judgment against an officer-director forfeiting the salary paid to him during the time that he had breached his fiduciary duties to his corporation is proper regardless of whether or not the corporation could have discharged him, for the insertion in an employment contract of an express provision for termination is not to be looked upon as a relinquishment of rights that the corporation would have had without such provision. (Pp. 313-14.)

Appeal from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Kane County; the Hon. John S. Petersen, Judge, presiding.

Reid, Ochsenschlager, Murphy & Hupp, of Aurora, and Hillix, Brewer & Myers of Kansas City, Missouri (Lambert M. Ochsenschlager, John M. Lamont, Wayne F. Weiler, Albert F. Hillix, William C. Murphy, and Stephen J. Mrkvicka, of counsel), for The Vendo Company.

Barnabas F. Sears, James E. S. Baker and James N. Kosmond, all of Chicago (James A. Hardgrove, Thomas L. Brejcha, Jr., Boodell, Sears, Sugrue, Giambalvo & Crowley, and Sidley & Austin, of counsel), for Harry B. Stoner and Stoner Investments, Inc.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This appeal is the outgrowth of litigation which commenced in 1965 with the filing of a complaint in the circuit court of Kane County by plaintiff, The Vendo Company, against Harry B. Stoner and Stoner Investments, Inc., a company of which Stoner is the president and whose sole stockholders are Stoner and his wife.

The case was tried without a jury and resulted in a judgment against Stoner in the amount of $250,000 and a judgment against Stoner and Stoner Investments, Inc., of $1,100,000. An appeal was taken by defendants to the Appellate Court for the Second District, and that court reversed the judgment in part and remanded the cause for further hearings with respect to the amount of damages properly recoverable by the plaintiff. (*Vendo Co. v. Stoner* (1969), 105 Ill. App. 2d 261.) Plaintiff filed a petition for leave to appeal which was denied by this court.

Following the hearings on remand the circuit court entered a judgment against Stoner for $170,835 and a judgment against both defendants for $7,345,500. The case was again appealed to the appellate court by defendants. That court affirmed the judgment awarding damages against Stoner individually, but it reversed the judgment rendered against the two defendants jointly for

$7,345,500, and remanded the cause for additional hearings as to the amount of damages. (*Vendo Co. v. Stoner* (1973), 13 Ill. App. 3d 291.) Each party filed a petition for leave to appeal, and each petition was allowed.

The intricate and prolonged litigation now before us concerns the development and marketing of a new and successful type of candy-vending machine by a concern called Lektro-Vend, allegedly with the active support of each defendant, during the period when Stoner was an employee and a director of plaintiff. Before discussing the two decisions hitherto rendered and the contentions now made by the parties, it is necessary to review various events which took place in 1959 and thereafter.

In April of 1959 the defendant Harry B. Stoner was the president and the controlling owner of Stoner Manufacturing Corporation, an Illinois corporation with its principal place of business in Aurora, Illinois, and a predecessor of the corporate defendant here. Stoner Manufacturing Corporation had been engaged for many years in the business of making and selling candy-vending machines throughout the United States. The plaintiff, a Missouri corporation located in Kansas City, Missouri, was at that time engaged in the business of manufacturing and selling vending machines designed to handle beverages, ice cream, and various other products. It did not make a machine for vending candy, but at least as early as 1958 it had considered the possibility of making a candy-vending machine, and had undertaken some research into that matter.

In April, 1959, plaintiff and Stoner Manufacturing Corporation entered into a contract for the purchase by plaintiff of the assets of the corporation, including inventions, patents, drawings, designs, and research and development work. Plaintiff's purpose in making the acquisition was in part to add a candy-vending machine to its line. So far as Harry B. Stoner was concerned, the motive for the sale appears to have arisen from a concern

that the poor state of his health would prevent him from continuing in the active direction of his company.

Under the sale agreement plaintiff was to pay the Stoner Manufacturing Corporation $3,400,000 in cash and to deliver to it 60,000 shares of plaintiff's stock. The land and the property constituting the Stoner Manufacturing Corporation plant was leased to plaintiff at a stipulated rental for 10 years with an option of renewal for a like period. Plaintiff was also given an option to purchase the property on or after December 31, 1961.

Plaintiff agreed to pay annually, for a period of 10 years or until such time as it might exercise its option to purchase the plant, all profits in excess of $250,000 realized from the use of the assets being purchased. Any amount theretofore paid by plaintiff out of profits was to be credited upon the purchase of the plant. Plaintiff further agreed to pay, for a period of 10 years, 25% of the income received from foreign sales realized from the use of the assets being purchased.

The corporation agreed to use its best efforts to preserve its business organization intact, and to keep available to plaintiff the services of its present officers and employees.

The sales contract contained several restrictions on competition by the selling corporation. The contract specified:

> "From and after the closing, the Company [*i.e.*, Stoner Manufacturing Corporation] will not own, directly or indirectly, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10) years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company. The Company also agrees that during its

> corporate existence it will, without incurring any financial obligation, co-operate with Vendo to prevent the use by others of the names 'Stoner' and 'Stoner Mfg. Corp.' in connection with any business similar to that now carried on by the Company and also agrees not to disclose to others, or make use of, directly or indirectly any formulae or process now owned or used by the Company."

On June 1, 1959, Stoner executed an employment contract with plaintiff. The contract recited plaintiff's desire to employ Stoner's services, and it stated that the value of his services consisted of his "advice and counsel in the operation of the Aurora, Illinois, facility, and his know-how, experience and reputation in the vending machine field."

A paragraph of the employment contract also contained a limitation on competition. It provided:

> "5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company [*i.e.*, the Vendo Company] or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or salesman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter."

The candy-vending machine which was being manufactured by Stoner Manufacturing Corporation at the time it sold its assets to plaintiff in 1959 was a model which is called a "drop shelf" machine in the jargon of the trade. The "Lektro-Vend" model subsequently developed by the

Lektro-Vend Company possessed three significant advantages over the drop-shelf model which made it popular and successful with companies, known as "operators," who purchase and service vending machines. The first of these advantages was that the machine could sell candy bars in the same order in which it had been stocked, a method called "FIFO," standing for first-in, first-out. The FIFO design produced savings to the operator by reducing the risk of having to vend or to discard stale items, and reducing the frequency of service calls to restock the machine. The second advantage of the Lektro-Vend model was that it permitted a continuous visible display of the item which was next to be vended. Thirdly, the Lektro-Vend employed a type of construction which permitted more than one type of product to be stocked on a single conveyor, thus eliminating the need to exhaust one product line before replacing it with a second. While each of these traits had been in existence for some years, Lektro-Vend was the first to combine all of them in a single machine having a practical design.

As the result of research into the possibility of developing a vending machine of this character, plaintiff, in August, 1959, had built two developmental models, sketches of which were shown to Stoner. Representatives of plaintiff, while agreeing on the desirability of developing a machine with such capabilities, considered this particular prototype to be defective in certain mechanical respects and also as being too expensive to produce. The research project for the machine was accordingly shelved.

In mid-1960, two engineering employees of plaintiff, Rod Phillips and his son William, each of whom had been employed by the Stoner Manufacturing Corporation prior to the date of the sale of its assets to plaintiff, became dissatisfied with their job situation with plaintiff and resigned. At this time certain disagreements had developed between Stoner and plaintiff as to Stoner's role in plaintiff's operations, which Stoner considered should be

more than the merely advisory function to which plaintiff had, in his view, assigned him.

No evidence was introduced to show that Stoner played any part in inducing the resignation of either of these employees of plaintiff, but each of them approached Stoner after his resignation, and solicited his financial support in the design and development of certain devices. William Phillips, in mid-1960, induced Stoner to pay him a salary while he designed an electronic coin-detecting device. The machine, as the appellate court concluded, had no functional relation with the subsequent development of the Lektro-Vend vending machine, and consequently has no bearing on the claim made by plaintiff against defendants.

In late 1960 or early 1961, however, Rod Phillips approached Stoner with a request that Stoner provide financial support to cover the development of a vending machine, of the new type which has already been described, and Stoner agreed to do so. Stoner testified that the understanding was that Phillips would own the machine, if it were developed, and would be entitled to any profits earned from it. There is no confirmation of Stoner's testimony in this regard. Rod Phillips was not called as a witness because of a medical representation that his physical condition was unsatisfactory. While a stipulation was entered on the record as to what his testimony would have been had he appeared, the stipulated testimony did not refer to the prospective ownership of the machine.

Interest-free loans which aggregated some $200,000 were made to Phillips by Stoner Investments during 1961 and 1962. Some of these funds were used to buy equipment necessary for the engineering of the machine. Stoner also made available rent-free a building owned by him for use in conducting the development work. In 1961, when two more former employees of Stoner Construction Corporation, who had had experience in design and

toolmaking, resigned from employment with plaintiff, they joined Rod and William Phillips on the research and development project. They received monthly salaries aggregating $1,150 from Stoner Investments.

By October, 1962, the developmental work on the new machine had progressed to the point where a prototype could be exhibited at a trade show held in San Francisco. The model shown differed in many important respects from and was a major improvement upon the device which plaintiff had worked on in 1958 and 1959, and it won a very favorable reaction in the industry.

Following the trade show, which had been attended by several of plaintiff's personnel, and the return of Rod Phillips to Illinois, several important developments took place. Their sequence and the exact dates when they occurred are not made wholly clear by the evidence, but in main outline they can be summarized as follows.

Shortly before December 18, 1962, on which date plaintiff's board of directors was to meet, Stoner asked the chairman, Elmer Pierson, to be released from his employment contract, stating that he had an opportunity to invest in the manufacture and sale of the Lektro-Vend machine. Stoner did not disclose that he had already been giving support to the development of Lektro-Vend.

Plaintiff refused to release Stoner from his contract. A letter dated January 2, 1963, from Pierson explained the refusal in the following language:

> "I have always felt that one of the major advantages of the Stoner acquisition contract, from our standpoint, was the fact that it guaranteed that your design genius and experience would never be coupled with our money to put a new and most formidable competitor into the business against Vendo. I can assure you that nothing has happened in recent years to change our position on this matter in any way. I am sure you will understand."

Pierson went on to say that plaintiff itself had an interest in buying the Lektro-Vend. He asked Stoner to ascertain if Phillips had any interest in selling it, and if so,

to set up a meeting between Phillips and representatives of plaintiff. Stoner then wrote one of plaintiff's vice-presidents, Spencer Childers, that Phillips would be willing to sell if the price were high enough. Stoner told plaintiff that Phillips wanted $1,500,000, and that a third company had expressed a willingness to pay that amount.

A meeting did take place between Phillips and representatives of plaintiff in the latter part of January, 1963. The purpose of the meeting was to show plaintiff's representatives how the Lektro-Vend worked, and the record does not indicate that price was discussed. In March, Stoner informed plaintiff that he had told Phillips that he assumed, in the absence of further word from Childers, that plaintiff no longer had an interest in making the purchase. Childers wrote back on April 9 stating that plaintiff did still have such an interest, but that the asking price of $1,500,000 was too high. Plaintiff stated that it was, however, prepared to pay a lower price which would be enough to cover development costs and return a fair profit to Phillips and his associates. The record does not indicate whether this counteroffer was transmitted to Phillips. In any event Stoner testified that the "negotiations" between Phillips and plaintiff terminated at this time.

It must be added that the record casts some doubt on whether at this time Phillips seriously entertained any intention of selling the Lektro-Vend design at all, rather than going into the manufacture and sale of these machines himself. Mrs. Ruth Netrey, Stoner's sister-in-law, testified that back in December, 1962, Phillips had called her to request a loan to assist him in connection with the manufacture of a vending machine he was developing. Mrs. Netrey initially lent Phillips $350,000, which was later increased to $525,000, at an interest rate of 4½%. No payment was made on either principal or interest until September, 1963, at which time Mrs. Netrey received a note for the amount due her from the Lektro-Vend

Corporation, which had just been organized. The proceeds of the loan were used in part to pay off the loan due Stoner, as Mrs. Netrey and Stoner each knew. Stoner testified that his notes were repaid because he had to "withdraw his support" when Phillips wanted to go into manufacturing.

During 1963 Rod Phillips proceeded with his plans to set up a manufacturing operation, and in March or April Stoner Investments completed the construction of a building in Aurora which was made available to Phillips for this purpose.

Stoner had a further conversation with Pierson in the spring or summer of 1963, in which Pierson inquired as to the actual extent of Stoner's involvement with Phillips. Stoner told him that the relationship had been confined to loans and that these had since been repaid by another person. Stoner did not disclose that this other person was his sister-in-law. This conversation marked the first occasion on which Stoner disclosed any involvement with Lektro-Vend, and the disclosure was far from complete.

The Lektro-Vend Corporation was formed in September. Its original stockholders were Rod Phillips and William Phillips, certain other employees, and Mrs. Netrey, who held 50% of the stock. Neither Stoner personally nor Stoner Investments was a stockholder at that time.

In March, 1964, shortly before Stoner's contract with plaintiff was to lapse, Stoner Investments contracted to sell to Lektro-Vend the new plant which had been built by Stoner Investments during the previous year. The purchase was made with the proceeds of a bank loan which was advanced subject to an agreement by Stoner Investments to guarantee the repurchase of the property in the event of a default on the loan.

Stoner's contract of employment terminated June 1, 1964, and it was not renewed. Although the appellate court in its first opinion states that Stoner remained on the board of plaintiff until the spring of 1965, defendants

refer us to testimony by Stoner that he ceased being a director in March or April of 1964, and that testimony was corroborated by testimony of plaintiff's secretary.

On June 10, 1964, Lektro-Vend issued 5,000 shares of stock to Mrs. Stoner, and on July 15 it issued 5,000 shares of stock to Stoner Investments. In the years of 1965 and 1966, loans exceeding $350,000 were made to Lektro-Vend by Stoner Investments or another company controlled by Stoner.

In March, 1965, Stoner sent a letter to 50 vending-machine operators in which he identified himself as the longtime former president of the old Stoner Manufacturing Corporation, and stated that he was now interested in Lektro-Vend. The letter contained the following passage:

> "I believe that I can lay claim to having personally initiated the design and production of more vending machines still in use than any other one man in the history of vending. I believe that vending machines of my design still in use are making operators better than a million dollars a week right now and I am willing to risk my reputation as a vending machine designer and manufacturer to say that the LEKTRO-VEND products will set new highs in earnings to operators and will be the standard of comparison for the next 50 years."

The letter was plainly intended not only to associate Lektro-Vend with Stoner, but to convey to a reader the impression that Lektro-Vend would receive the benefits of the skill and reputation which Stoner had enjoyed as the head of Stoner Manufacturing Corporation.

Plaintiff's original complaint contained two counts, the first directed against Stoner individually and the second against Stoner Investments. Each count alleged a breach of the covenants not to compete contained in the sales and employment contracts, and each sought recovery in the amount of $500,000. Plaintiff subsequently amended each count to include additional allegations seeking recovery for the theft of a trade secret, a claim predicated on Stoner's having seen in 1959 the sketches of the

prototype developed by plaintiff. The amount of the *ad damnum* was also raised to $1,500,000 on each count, and later to $7,000,000.

As previously noted the trial court entered a judgment against Stoner individually for $250,000 and a judgment against Stoner and Stoner Investments jointly for $1,100,000. As viewed by the appellate court in its first opinion the first judgment was intended to represent a forfeiture of Stoner's salary during a 4-year period during which his breach of duty was occurring. The larger sum represented the damages allowable on the trade-secret theory, calculated on the basis of the $1,500,000 which Stoner had said Lektro-Vend was worth in 1962, less $400,000 for the estimated costs of developing it.

The appellate court rejected the claim based on the theft of a trade secret, on the grounds that in 1959 plaintiff was in possession only of an idea or a goal which had not been reduced to a specific means of accomplishment, that any disclosure to Stoner had been incomplete, and that the substantial differences between the plaintiff's prototype and the Lektro-Vend made it unlikely that the knowledge of the former could have contributed to the development of Lektro-Vend. The appellate court did hold, however, that plaintiff was entitled to damages over and above the $250,000 to the extent that there were lost profits which were attributable to the breach of the covenants and diminution of its business, and the court remanded the cause to the circuit court for further evidence on this issue.

The principal issue which now divides the parties is whether the trial court on the remanded hearing measured damages according to the proper standard. Plaintiff makes the claim, which the trial court accepted, that plaintiff is entitled to a sum equal to what its profits would have been had plaintiff been the owner of Lektro-Vend. Defendants maintain plaintiff can recover only those lost profits attributable to the fact that the products which plaintiff

did in fact make and sell had to compete with the Lektro-Vend machine. The latter figure, each party appears to assume, would be much smaller than the former, for it would be necessary to exclude from it any losses attributable to other causes, such as competition from companies other than Lektro-Vend, the inferiority of plaintiff's drop-shelf machines as compared to the Lektro-Vend, and the fact that the market for candy-vending machines contains several submarkets, some of which were not served by both plaintiff and Lektro-Vend to the same extent.

Quite apart from any liability which may be predicated upon a breach of the covenants against competition contained in the sales agreement and the employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and an officer of plaintiff. Beginning in 1960 or 1961 and continuing up until just before he ceased to be employed by plaintiff he contributed substantial financial support, either directly or through Stoner Investments, Inc., to the development of a superior machine which would be competitive with the older and less satisfactory model produced by plaintiff. Stoner testified that up until a date shortly before the Lektro-Vend was publicly exhibited he did not see the models, and Phillips's testimony confirms this. Stoner also testified that until that time he did not even know that Phillips was working on such a machine. This latter testimony, however, was contradicted both by testimony given by Stoner on his deposition and by Phillips. In view of the substantial amounts which he was spending on Phillips's research project, moreover, Stoner's testimony that he never inquired as to Phillips's activities or visited the plant to inspect the work in progress is highly implausible. We conclude, as the trial court must have concluded, that Stoner was fully aware of the nature of the device which was being developed and also of its competitive potential. Indeed, Stoner himself testified that

when he first observed the finished Lektro-Vend he called it "the vending machine of the future," and predicted that it would render other models obsolete.

Stoner was hired by plaintiff on the basis of the skill and experience which he could bring to plaintiff. Defendants contend that plaintiff did not take advantage of Stoner's talents and gave him the role of a mere figurehead. Assuming that plaintiff, whether prudently or imprudently, failed to make the best use of Stoner's abilities, such a failure certainly did not release Stoner from his duty not to assume a position which would be adverse to that of his employer.

In addition to his prior and subsequent support of Phillips's development of Lektro-Vend, Stoner's actions in respect to plaintiff's unsuccessful attempts in late 1962 and early 1963 to purchase the design violated his fiduciary obligations. In view of Stoner's prior expression of a desire to leave plaintiff's employment so that he could become associated with Phillips, it was perhaps naive of plaintiff to assign Stoner himself as its intermediary. Had he disclosed the extent of his financial involvement in the Lektro-Vend, it may be doubted whether plaintiff would have done so, rather than dealing with Phillips directly or through some other agent.

Stoner had a foot in each camp. Not only did his undisclosed individual interest in controlling the further development and ultimately the manufacture and sale of the Lektro-Vend create the possibility of his taking an unfair advantage of plaintiff, but the evidence gives strong indication that he actually misled plaintiff while he was purportedly acting as plaintiff's agent with regard to plaintiff's possible acquisition of the Lektro-Vend. The information given plaintiff that Phillips wanted a price of $1,500,000 for the Lektro-Vend came only from Stoner. Whether Phillips might have been willing to sell at a lower figure acceptable to plaintiff is unknown.

We recently had occasion in *Kerrigan v. Unity Savings Association* (1974), 58 Ill.2d 20, to consider the ob-

ligation upon a director or officer to make full disclosure to his corporation. In that case, involving the appropriation of a business opportunity, the defense was made that the plaintiff, a savings and loan association, lacked the legal power to engage in the business which defendants were carrying on, which was the operation of an insurance agency. We rejected that defense for the reason that the association had never been given the opportunity to decide that question for itself. We said:

> "*** if the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations. If directors fail to make such a disclosure and to tender the opportunity, the prophylactic purpose of the rule imposing a fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf." 58 Ill.2d at 28.

See also the discussion of the fiduciary duties of officers and directors by the appellate court in *Paulman v. Kritzer* (1966), 74 Ill. App. 2d 284, 289-295, which was specifically endorsed by this court in our affirmance of that decision. *Paulman v. Kritzer* (1967), 38 Ill.2d 101, 104; *cf. Lerk v. McCabe* (1932), 349 Ill. 348, 360-362; Restatement (Second) of Agency secs. 387, 389, 391, 393, 394 (1958).

Plaintiff was not, as defendants urge, limited to the recovery of the profits which accrued to Lektro-Vend. (See Restatement (Second) of Agency secs. 399, 401, 407 (1958).) The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk. For if his misconduct were discovered the most that he could lose would be the profit gained from his illegal venture; the law would have

operated only to restore him to the same position he would have been in had he faithfully performed his duties.

Defendants repeatedly state that the failure of plaintiff to develop a FIFO-type machine showed a lack of interest on its part. We have reviewed the testimony and we conclude that plaintiff did have and retained an interest in having such a machine. Its failure to develop one itself initially rested on problems in the design of the particular model which had been developed. The instances in which plaintiff, after 1962, failed to develop such a machine seem in part to be explained by a concern that several other companies had by then developed similar machines and that it might be too late for plaintiff to successfully enter the market. We are not called on here to review the business prudence of plaintiff's decisions, however, and we cannot say that plaintiff would have declined an offer to purchase the Lektro-Vend, with its advanced technology, or to seek to develop such a machine itself had a genuine opportunity to do so been extended to it.

Defendants assert that the evidence introduced by plaintiff on the remand and the theory on which it was offered did not comport with the law of the case as established by the first opinion of the appellate court nor with the court's mandate. Plaintiff disputes defendants' interpretation of the first opinion of the appellate court. We need not consider this point, however, since the doctrine of the law of the case is not applicable to this court in reviewing the judgment of the appellate court. *Sjostrom v. Sproule* (1965), 33 Ill.2d 40.

Defendants also urge that the plaintiff has impermissibly changed the theory of its case from that on which it relied in the first trial. We think that defendants' contention represents an artificial analysis. In some situations there could be, of course, a violation of a covenant not to compete without the breach of a fiduciary duty, as would be the case if Stoner had not been an officer and director of plaintiff. In the present case, however, the acts of

defendants in misappropriating the Lektro-Vend and their use of it to compete against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff.

We are not confronted here with the situation in which a litigant attempts to interject on appeal a theory never advanced in the trial court. Plaintiff made its theory quite explicit in the trial on remand. It is a familiar principle, moreover, that when an appeal is taken the appellee may defend the judgment below on any ground appearing of record. (*Shaw v. Lorenz* (1969), 42 Ill.2d 246, 248.) We fail to see how defendants have suffered any prejudice from any supposed change in the theory on which plaintiff has presented its case.

The remark made in *People ex rel. Modern Woodmen of America v. Circuit Court* (1931), 347 Ill. 34, 47, relating to piecemeal litigation, on which defendants rely, was made in a discussion of the extent to which matters which had been or could have been litigated in one suit are barred by *res judicata* from being relitigated in a second suit involving the same subject matter. The case is not in point here.

Finally, defendants contend that the evidence offered on the remand and the judgment of the trial court are not in conformity with the allegations of the complaint, since the complaint charges defendants only with breach of the covenants not to compete. For the reasons given above, we do not think the defendants' point is well taken. In any event, so far as the complaint might be thought to be deficient, plaintiff, before submission of this case for decision, filed a motion under Rule 362 to amend the complaint in order to conform it to the proof. Defendants filed objections to the motion, and we took the motion with the case. Essentially the proposed amendment adds to the existing allegation that Stoner indirectly and directly entered into the vending-machine manufacturing business through the provision of financing, advice and use of

facilities, the further allegation that Stoner did so as an officer and as a director and that his actions were "for the development of an economically and functionally successful vending machine complementary to the product line of the plaintiff corporation, all of which was done without the knowledge, consent, or approval of the plaintiff corporation." The motion to amend is accordingly allowed.

Defendants also contend that the covenants against competition contained in the sale agreement and the employment contract were illegal restraints of trade. The basis for this claim is that each covenant covered an excessively broad geographical area, namely an area coterminous with all areas in which plaintiff was doing business, and, in the case of the employment contract, any additional areas into which plaintiff, to Stoner's knowledge, planned to extend its operations. Defendants state that the covenants were broader than the protection necessary to plaintiff warranted and should have been confined to those areas in which the predecessor of Stoner Investments had been functioning.

Defendants further claim that the covenants were in fact not breached, since the activities of defendants fell short of directly or indirectly entering into the vending-machine business. The appellate court concluded, in our opinion correctly, that defendants' activities directed toward the development and thereafter the marketing of the Lektro-Vend, consisting of substantial financial aid, and the provision of physical facilities, as well as defendant's ownership interest in the Lektro-Vend enterprise, were so substantial as to go beyond the limits established by the covenants.

Regardless of the appellate court's disposition of those restraint-of-trade issues, the defendants may, as we have pointed out, be held liable on the ground of a breach of fiduciary obligation on the part of Stoner. Although arguing in their brief that the covenants not to compete

are wholly invalid, defendants somewhat inconsistently maintain in this connection that those same covenants were effective limitations upon what might otherwise be the full sweep of their fiduciary duties. In this connection defendants rely on *Anderson v. Dunnegan* (1933), 217 Iowa 672, 250 N.W. 115. That case, like this one, involved a charge that business opportunities of an enterprise had wrongfully been diverted to an outside concern. The business there involved was originally conducted as a partnership and later incorporated. The decision rendered against plaintiffs, however, was based on the court's finding that a majority of the other partners, subsequently stockholders in the corporation when the latter was formed, had knowingly acquiesced in the diversion. No such elements play a role here.

At the original trial defendants raised as an affirmative defense and by way of counterclaim a charge that the sale agreement and the employment contract violated both the Illinois Antitrust Act (Ill. Rev. Stat. 1973, ch. 38, par. 60–1 *et seq.*) and the Federal antitrust laws (15 U.S.C. sec. 1 *et seq.*). The latter charge was withdrawn by defendants on the remand, and references in the record indicate that at some point a suit was filed against plaintiff in the United States District Court for the Northern District of Illinois relating to the alleged violations of Federal law.

With respect to the State antitrust claim the appellate court on the first appeal affirmed the action of the trial court in striking the affirmative defense and counterclaim. On the remand defendants unsuccessfully sought to reinstate their defenses and counterclaim, and the appellate court again affirmed the judgment of the trial court in this respect. By leave of court the State of Illinois has filed a brief supporting defendants' position on this issue.

There is some dispute between the parties as to whether the first opinion of the appellate court was based on the theory that the Illinois act was preempted by the

Federal antitrust laws or upon the inapplicability of the Illinois act because of the absence of a substantial impact in Illinois arising out of the acts complained of.

We prefer to dispose of this issue on another ground, namely that the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants. It is familiar doctrine that statutes will ordinarily not be construed so as to produce retroactive application, absent some clear expression of an intention to do so. The rule is peculiarly applicable, for constitutional reasons, where a criminal statute is involved. Such is the case here with the Illinois Antitrust Act, even though the particular portion of the Act being relied on is the section creating a right in private parties to bring a civil suit for damages, including in some instances treble damages. Ill. Rev. Stat. 1973, ch. 38, par. 60–7.

Various challenges are made by defendants to the evidence of damages which was adduced by plaintiff with respect to the $7,345,000 judgment entered against both defendants jointly. To a large extent defendants' objections represent no more than a rejection of the underlying theory of liability which we have held is applicable, namely, that plaintiff is entitled to be compensated for the difference between the profits which it could reasonably be expected to make if it had been the owner of the Lektro-Vend and the profits which it did in fact earn from the sale of candy-vending machines.

In our consideration of this facet of the appeal we are mindful of two limiting factors. The first is that the loss of profits, whether past or future, claimed to arise out of exclusion from a market is customarily not susceptible of detailed or direct proof, and that unless proof of an inferential character is permitted, the result would be to immunize a defendant from the consequences of his wrongful acts. That principle has been frequently enunciated by the Supreme Court of the United States in the context of actions to recover damages resulting from

violations of the Federal antitrust laws. (See *Bigelow v. RKO Pictures, Inc.* (1946), 327 U.S. 251, 264-265, 90 L. Ed. 652, 660; *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969), 395 U.S. 100, 123-124, 23 L. Ed. 2d 129, 148-149, 89 S. Ct. 1562.) The principle is equally applicable where the claim of lost profits arises from a violation of fiduciary obligations or breach of contract. See *Schatz v. Abbott Laboratories, Inc.* (1972), 51 Ill.2d 143, 147-149.

The second limiting factor is that, as noted in the *Schatz* decision (51 Ill.2d at 149), the assessment of damages by a trial court sitting without a jury will not be set aside unless it is manifestly erroneous.

The judgment of $7,345,000, according to the trial court, was the sum of the profits lost to plaintiff between 1962 and June, 1969, during the period of defendants' breach ($2,135,000), and the diminution in the value of plaintiff's business as of June, 1969, attributable to defendants' activities ($5,210,500).

The former figure was derived from data showing the sales of vending machines, obtained from surveys conducted for plaintiff, corporate records of plaintiff, and publications of the United States Department of Commerce.

The sales data showed that plaintiff, after acquiring the assets of the Stoner Manufacturing Corporation, had a share of the candy-vending market, calculated in terms of the dollar amount of sales, of about 31%, and that for the 10-year period from 1959 to 1969 plaintiff had approximately the same share of the market for vending machines other than those used for vending candy. Between 1962, just before the Lektro-Vend machine came on the market, and 1969, plaintiff's share in the candy-vending-machine market shrank to slightly over 16%, whereas its share of the noncandy-vending-machine market remained stable. Plaintiff's actual sales of candy-vending machines in 1962 amounted to about $5,400,000. In 1969 they were $4,166,000. By way of contrast the sales of Lektro-Vend

rose from $48,000 realized in 1963, its first year of production, to $2,298,000 in 1969. Its sales for the entire period aggregated about $7,000,000.

The theory on which plaintiff proceeded was based on the proposition that if plaintiff had had the Lektro-Vend, it would have continued to hold the same market share that it had before defendants entered the market. By way of illustration plaintiff estimated that it had lost sales of $18,490,000 over the period from 1962 to 1969. After calculating the difference between the sales volume which could be anticipated on that assumption and the actual sales volume, a profit ratio was then applied so as to arrive at the lost profits.

The second component of the judgment, referred to as the diminution in the value of plaintiff's business as of June, 1969, was intended to reflect the fact that after June, 1969, a number of years would be required for plaintiff to regain its former market position. One of plaintiff's expert witnesses calculated this element of plaintiff's damages by making a comparison between the future sales which could be anticipated with plaintiff's share restored and the sales which could be anticipated without such restoration. A profit ratio was then applied to translate the sales figures into lost profits, and the latter figure was discounted so as to reflect present value. A second expert witness employed a somewhat different method whereby he capitalized the amount of what he determined to be the average annual lost profits prior to 1969.

Defendants contend that the underlying data concerning plaintiff's sales volume is based in part upon a survey which, according to defendants, did not cover a representative sample. Defendants' criticism is blunted, however, by their failure to object to the admission of the exhibits containing the information in question.

Moreover, while defendants advert to the substantial difference in amount between the judgment given on the first trial and that given in the second, defendants' brief

fails to charge that the latter was excessive. The amount of the second judgment appears to fall within the range of estimates given by plaintiff's expert witnesses on loss of profits and diminution of value of plaintiff's business. The difference, in any event, is explainable in part by the lapse of time between the first and second trials. Judgment in the first was entered in December, 1966. The hearing of evidence in the second did not commence until April, 1971. Some evidence regarding the extent of plaintiff's damages which was available for the second trial would not have been available in 1965 and 1966.

[9] Defendants also argue that it was improper to award damages for lost profits attributable to a period following the expiration of the covenants not to compete. We have held, however, that defendants' liability is not measured exclusively by these covenants but rests as well on a breach of fiduciary obligations.

[10] In their appeal defendants also challenge the judgment of $170,835 against Stoner individually. That judgment represented the forfeiture of his salary for three years and five months, the period during which the court found that he had breached his fiduciary duties, starting with the loans to Phillips in 1961 and ending with his guarantee of the bank loan to Phillips in 1964.

[11] Defendants' initial contention is that plaintiff's sole remedy against Stoner was to terminate its contract with him, and that in any event plaintiff waived any right to other relief which it may have had by failing to discharge him. The appellate court in each of its opinions rejected this line of argument, and we do so as well. The insertion in an employment contract of an express provision for termination is not to be looked upon as a relinquishment of rights which plaintiff would have had without that provision. Nor do we see in what manner the failure of plaintiff to bring suit against defendants earlier than it did barred it from recovering damages, even assuming, contrary to what the evidence shows, that plaintiff was aware of defendants' breach.

Defendants next contend that the forfeiture of Stoner's salary in addition to the allowance of damages for plaintiff's lost profits constitutes an improper double recovery. The judgment against Stoner did not represent a forfeiture of his total salary but only for the period of time beginning with the breach of his duty of loyalty. In this respect the case at hand differs from *Ely v. King-Richardson Co.* (1914), 265 Ill. 148, where employees who had been discharged for setting up a competitive business were held to be entitled to moneys owed them for a period antedating that action. It borders upon the frivolous for defendants to claim a right to retain the compensation which the judgment restored to plaintiff.

Defendants' final point is that the trial court "had no jurisdiction to enter two final judgments against Harry Stoner on one count." We have examined the brief filed by defendants in the appellate court on this appeal, and we are in some doubt as to whether the question now under discussion was raised before that court. We are, moreover, unable to discern the meaning of this assertion or to perceive any manner in which defendants have been prejudiced by the fact that two separate judgments were entered. As we have stated, the smaller judgment, entered only against Stoner individually, was designed to recover the salary paid him by plaintiff. The larger judgment was designed to compensate plaintiff for its lost profits. That judgment was entered against both defendants because each had participated in the pattern of wrongful acts on which this suit was founded. Stoner Investments, Inc., is wholly owned by Stoner and his wife, and we do not understand that satisfaction of the judgment for $7,345,000 would require a separate payment of this amount by each defendant.

For the reasons discussed in this opinion the judgment of the appellate court is reversed and that of the circuit court is affirmed. *Appellate court reversed, circuit court affirmed.*

APPENDIX G

PETITIONERS' PETITION FOR REHEARING IN THE ILLINOIS SUPREME COURT

IN THE

Supreme Court of Illinois

SEPTEMBER TERM, 1974

THE VENDO COMPANY,
a Missouri Corporation,

Plaintiff-Appellee-Appellant.

vs.

HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware Corporation,

Defendants-Appellants-Appellees.

Appeal from the Appellate Court of Illinois, Second District.

There Heard on Appeal from the Circuit Court of Kane County.

Honorable John S. Petersen, Judge Presiding.

PETITION OF HARRY B. STONER AND STONER INVESTMENTS, INC. FOR REHEARING

May It Please The Court:

Defendants-Appellants-Appellees, Harry B. Stoner and Stoner Investments, Inc., pursuant to Supreme Court Rule 367, respectfully request a Rehearing for the following reasons which this Court has overlooked or misapprehended.

NOTE: Op: Supreme Court Opinion filed September 27, 1974
PB: Plaintiff's (Vendo) Brief—White
PAB: Plaintiff's (Vendo) Answer Brief—Blue
PRB: Plaintiff's (Vendo) Reply Brief—Yellow
DB: Defendants' (Stoner) Brief—White
DAB: Defendants' (Stoner) Answer Brief—Blue
DRB: Defendants' (Stoner) Reply Brief—Yellow
App. A: First Appellate Court Opinion (105 Ill.App.2d 261)
App. B: Second Appellate Court Opinion (13 Ill.App.3d 291)
(Both opinions are reprinted as Appendices in PB and DB)
Italics ours unless otherwise noted.

We respectfully submit that this Petition for Rehearing merits the most serious consideration to avoid grave injustice. The Court's opinion recognized that this litigation was "intricate and prolonged" (Op. 1). We submit that a misunderstanding of certain basic issues has lead the court into serious error.

The Court's opinion (1) permits Vendo to recover a judgment on a theory neither pleaded nor raised below (corporate opportunity) and on which there never has been a trial: (2) has denied defendants an antitrust defense and remedy, basing its denial on a theory of retroactivity, which is inapplicable to the defense and which misreads the relief sought in the counterclaim: (3) assumes causal relationship between liability and damages, without support in the evidence, as found by the Appellate Court: (4) applies a measure of damages going far beyond that established in corporate opportunity cases: (5) sanctions Vendo's monopolistic practices: and (6) denies defendants procedural and substantive due process contrary to the State and Federal Constitutions. We respectfully submit full understanding and proper resolution of these issues would change the result.

I.

IN AFFIRMING THE TRIAL COURT'S JUDGMENT ON THE BASIS OF BREACH OF FIDUCIARY DUTY OF A DIRECTOR AMOUNTING TO THE APPROPRIATION OF A CORPORATE OPPORTUNITY, THIS COURT HAS DENIED DEFENDANTS PROCEDURAL DUE PROCESS OF LAW.

We are now confronted with an opinion of this Court affirming a $7,345,000 judgment on the premise that "quite apart from any liability which might be predicated upon a breach of covenants against competition contained in the sales agreement and the employment contract, *it is clear that Stoner violated his fiduciary duties to plaintiff*" while a director (Op. 8), and "the acts of defendants in mis-

appropriating the Lektro-Vend and their use of it to compete against plaintiff are intertwined" (Op. 11), thus giving rise to the application by this Court of the doctrine of the appropriation of a corporate opportunity by a director (Op. 9, 10).

Not only has there never been a *trial* on those issues, this case cannot be decided by this Court *"quite apart from any liability which might be predicated upon a breach of the covenants"*, etc., much less on a *tort theory* of misappropriation by a director of a corporate opportunity, without offending procedural due process for a *very simple reason,* completely overlooked by this Court. The Appellate Court on the first appeal decided the *question of liability and scope of the issue to be heard upon the second trial.* It adjudged that the *covenants were valid and breached* by the defendants by reason of the financial and other assistance they had given Lektro-Vend as alleged in the complaint. It specifically remanded the case for the *sole purpose of* fixing damages by:

A. Determining the period of Harry Stoner's breach to set the amount of salary forfeiture (App. A 290).

B. Determining the amount of *"lost profits to Vendo during the period of the breach plus the diminution of its business at the end of the period covered by the covenants,"* by reason of the defendants' wrongful competition through the instrumentality of Lektro-Vend (App. A 290), as alleged in the Complaint (A. 1-7, 43-45).[1]

Thus the case went back for a second trial. Vendo ignored the judgment and mandate. It made no effort to show what damages it suffered by the wrongful competi-

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[1] See also the second opinion of the Appellate Court where it confirmed that it had "remanded the case to the trial court with directions to determine damages for breach of the covenants not to compete . . ." (App. B 292).

tion of Lektro-Vend, as ordered by the Appellate Court. Though it had Lektro-Vend's actual sales figures (A. 782), it "had no interest in Lektro-Vend" (A. 780; DAB 35). Instead, it proceeded, contrary to said mandate, upon a theory bereft of complaint allegations, namely, that its failure to have FIFO (any FIFO, not particularly the Lektro-Vend machine) was the fault of Stoner. True, as this Court points out, "plaintiff made its theory quite explicit on the trial on remand" (Op. 11), but we objected throughout that trial to the evidence Vendo adduced to support its new theory blaming Stoner for its failure to have a FIFO as beyond that mandate (A. 735-37, 758-62, 766-68, 772, 833-53, 867-74, 987-89) and moved to strike the testimony of plaintiff's experts based on that theory (A. 1047). The fact that Vendo "made its theory quite explicit in the trial on remand" should not override the pleadings in the case or supersede the *clear mandate of the Appellate Court governing that trial*, as this Court has erroneously permitted in its opinion.

We know of no law that says you can amend the pleadings to conform to the proof *in this Court*, where defendants consistently objected to the proof which not only was bereft of complaint allegations but flew in the face of the law governing the second trial as fixed by the mandate. As the Appellate Court clearly stated (App. B 294), "On reversal of a judgment and remand by a court of appellate jurisdiction, the trial court can take only such proceedings as conform to the judgment of the reviewing court," citing *People ex rel. Bauer* v. *Henry*, 10 Ill. 2d 324, 325 (1957); *Berry* v. *Lewis*, 27 Ill. 2d 61, 62 (1963); *Fiore* v. *City of Highland Park*, 93 Ill. App. 2d 24, 34 (2d Dist. 1968).

Unlike *Kerrigan* (Op. 9), where this Court granted leave to appeal from the reversal and remandment order of the Appellate Court of the trial court's first *and only*

judgment [11 Ill. App. 3d 766 (1st Dist. 1973)], this Court *denied leave to appeal* from the Appellate Court's first judgment here, *determining liability* and remanding the case for the *sole* purpose of assessing damages as set out in that mandate, thereby making that mandate final and binding upon the trial court and the parties upon the second trial [*Fiore* v. *City of Highland Park*, 93 Ill. App. 2d 24, 34 (2d Dist. 1968)].

In *Fiore*, this Court, as here, denied leave to appeal from the judgment and mandate of the Appellate Court, which reversed and remanded with specific directions after determining liability and which, as here, envisioned the taking of further evidence (93 Ill. App. 2d at 28-29). The City sought to avoid the effect of such judgment by passing an ordinance the effect of which was to negate the judgment and remand, and urged the doctrine of separation of powers to support its action (*id.*, at 29, 30).

Emphasizing the settled doctrine that upon reversal and remand the trial court, upon retrial, is bound by the decision and mandate of the Appellate Court (*id.*, at 34, 35), Mr. Justice Davis said, at p. 33:

> "However, a City which is an appellant in zoning litigation, cannot parlay the doctrine of separation of powers into an authorization to exercise its delegated legislative powers after the case is decided adversely to it and *remanded to the trial court with directions*, and thereby frustrate and void the opinion and mandate of the reviewing court to which it submitted its case for decision."

We respectfully suggest that Vendo cannot parlay the doctrine of appropriation of a corporate opportunity into this case and thereby frustrate and void the opinion and mandate of the Appellate Court, to which it submitted its case for decision *on breach of covenants not to compete and with respect to which the Appellate Court agreed* and remanded the case to assess damage by reason of such breach,

as alleged in the complaint. And we respectfully submit that, without offending due process, this Court cannot sanction such action.

To say, as this Court does (Op. 10, 11) that it can, *after the fact of the second trial and after denying leave to appeal* from the judgment *fixing the liability* and remanding the case for the sole purpose of determining damages as measured by that mandate, *change the law on liability and the measure of damages as fixed by that mandate,* and affirm a judgment entered in the second trial, over the objection of a defendant, *upon a different basis of liability and measure of damages* (breach of fiduciary duty and corporate opportunity) *without affording that defendant an opportunity to be heard in a trial court upon the law and the facts posed by those different issues,* simply boggles the mind.

Sjostrom v. *Sproule,* 33 Ill. 2d 40 (1965), *the only case* cited by the Court to support the doctrine that "the law of the case is not applicable to this Court in reviewing the judgment of the Appellate Court" (Op. 10, 11) is clearly inapposite here. We repeat, our point here is not that this Court, as a general proposition, cannot change the law of the case as laid down by the Appellate Court. It is that this Court, without offending due process, after a retrial based upon the judgment of the Appellate Court which determined liability (breach of covenants not to compete) and remanded with directions *solely* to fix damages resulting from that breach (as to which this Court denied leave to appeal) and which therefore was binding upon the trial court and the parties, *cannot thereafter change the law on liability and the measure of damages* (breach of covenants not to compete to breach of fiduciary duty by the appropriation of a corporate opportunity) without *reversing and remanding* the case to afford the defendants an opportunity to be heard upon the new legal and factual

issues arising as a result of the change. Otherwise, the law of the case which governed the trial court and the parties upon that retrial is but an illusion.

In *Sjostrom,* the Appellate Court had held that its first opinion "was palpably erroneous" and therefore it was not bound by the law of the case, just as we argued on the second appeal at bar, without success (App. B 295). But here, the Appellate Court adhered to the law of the case as laid down in its first opinion. *Sjostrom* (p. 41) cited *Zerulla* v. *Supreme Lodge Order of Mutual Protection,* 223 Ill. 518 (1906), but in *Zerulla* "the judgment and order of the Appellate Court reversing and remanding the case was *general in its terms and contained no directions to the trial court*" (223 Ill. at 519, 520).

Thus, neither *Sjostrom* nor *Zerulla* hold that this Court can retroactively change the law of the case on retrial, particularly where, as here, the remandment was for the sole purpose of assessing damages. "A judicial opinion, like a judgment, must be read as applicable only to the facts involved and is an authority only for what is actually decided." [*People ex rel Shuler* v. *Chapman,* 370 Ill. 430, 435 (1939); *Spring Hill Cemetery* v. *Ryan,* 20 Ill. 2d 608, 619 (1960)].

Again, in citing *Shaw* v. *Lorenz,* 42 Ill. 2d 246, 248 (1969), that "an appellee may defend the judgment below on any ground appearing of record" (Op. 11), this Court cites an inapposite case. *Shaw* was a direct appeal from the first trial. No question of the adequacy of the pleadings or the binding effect of a mandate fixing liability and remanding a case for the sole purpose of assessing damages according to a stated measure was there involved. In *Shaw* defendants failed to raise a defense upon the trial which they raised in this Court to support the judgment below, and this Court properly applied the hornbook rule.

Is this Court saying that *Shaw* holds that this Court can ignore a binding mandate governing a retrial upon which a party has a right to rely; that this Court can reverse the law laid down in that mandate, which contains specific directions for retrial on damage issues only, after denying leave to appeal therefrom; and that, after the case has been through the Appellate Court a second time, in this Court a party may urge any point to sustain the judgment so long as the "factual basis" for such point was before the trial court, when all along that "factual basis" was objected to by the other party who relied upon said mandate? (*Ante* p. 4) And particularly, where, as here, the "factual basis" relied upon involved a theory (appropriation of a corporate opportunity) never pleaded and raised for the first time in this Court, and with respect to which a defendant has never had an opportunity to be heard, either upon apt pleading or *evidence* upon trial?

This Court states that "*it is clear that Stoner violated his fiduciary duties to plaintiff during the period when* he was a director and an officer of plaintiff" (Op. 8). But nowhere in its opinion striking down Vendo's false trade secret theft theory (its sole claim in the first trial), and adjudicating that the *covenants were breached* and remanding *solely* to assess damages resulting therefrom, did the Appellate Court indicate that breach of a fiduciary duty by a *director* giving rise to the appropriation of a corporate opportunity was within the scope of the mandate, much less the claim that Stoner caused Vendo not to have FIFO or the Lektro-Vend machine.[2] In fact it held that Vendo's proof "did not conform to (its) decision and mandate" (App. B 294). Notwithstanding, this

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(2) The only reference to the word "fiduciary" was in the sentence "we agree that such a breach of Stoner's fiduciary undertaking as an *employee* in the instant case requires a forfeiture of salary" (App. A 288). The "such a breach" obviously refers to "*breach of the covenants not to compete*",

Court affirms this huge judgment on the theory that Stoner violated his fiduciary duties as a director by appropriating a corporate opportunity belonging to Vendo (Op. 9, 10), argued by it for the first time in this Court, and grants Vendo's motion to amend its complaint, filed contemporaneously with its brief here, saying, "We fail to see how defendants have suffered any prejudice from any *supposed* change in the theory on which plaintiff has presented its case" (Op. 11).

But, is not a defendant entitled to a trial according to the usual and customary procedures governing the judicial process? Is not a lawyer entitled to rely upon settled principles of procedure in defending his client? We did so here, objecting to the motion to amend, specifically pointing out in our answering brief to Vendo's that

> "This case wasn't tried as a corporate opportunity case in either trial, nor was it briefed or argued as such on either appeal. . . . We decline to pursue this red herring (corporate opportunity) further, *but are content to rely upon the pleadings and mandate of the Appellate Court which determined the issues to be tried in the second trial,* namely, the damages, if any, caused by the wrongful competition of defendants through the instrumentality of Lektro-Vend" (DAB 60).

What law says that a party who has been denied the rudiments of due process, whose heart is "fundamental fair-

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(2) *Continued*
which is referred to in the immediately preceding sentence. The rest of the opinion deals solely with the validity of the covenants (App. A 281-85), the time period during which they were valid (App. A 285-86), whether "defendants' activities amounted to the direct or indirect entering into or engaging in the vending machine business" as proscribed by the covenants (App. A 286-87), and the measure of damages "for the breach of a covenant not to compete" (App. A 287, 290), i.e., the damages caused by defendants' ***"wrongful competition"*** (App. A 291).

ness", must also show that he was *prejudiced* by their denial?

Moreover, defendants have been seriously prejudiced by never having had an opportunity to defend against this new corporate opportunity charge, either on the law or on the facts. Obviously the law on breach of fiduciary duty of a director amounting to an appropriation of a corporate opportunity is vastly different than the breach of a fiduciary duty pegged solely to non-competition covenants in a contract, where the claimed breach of said covenants *is wrongful competition through the instrumentality of a competitor* (Lektro-Vend Corporation).

Nor have defendants, *at a meaningful time and in a meaningful manner*, had an opportunity to defend on the facts with respect to this new corporate opportunity theory. The factual issues there involve questions of good faith, disclosure, use of corporate funds and control or lack of control over the corporation by the fiduciary, *among numerous others*, all as stated in *Paulman* v. *Kritzer*, 74 Ill. App. 2d at 294 (2d Dist. 1966), aff'd. 38 Ill. 2d 101, and cited and relied on by this Court (Op. 10).

Defendants could readily supply proof on the very issues admittedly left unanswered by this Court, namely, whether or not Phillips or Stoner owned the Lektro-Vend machine (Op. 4), whether Stoner transmitted Vendo's offer to buy Lektro-Vend on a cost-plus-profit basis to Phillips (Op. 5), whether Phillips ever had an intention to sell the Lektro-Vend design or was committed to manufacturing it (Op. 6), whether Phillips might have been willing to sell Lektro-Vend at a lower figure acceptable to plaintiff (Op. 9), and whether plaintiff would have declined to offer to purchase Lektro-Vend or seek to develop such a machine itself if Stoner had disclosed his interest (Op. 10).

It is submitted that only the first of the Court's "unknowns" ("Ownership") bears at all on the issue binding upon the trial court and the parties upon the retrial: what damage did Vendo sustain as a result of the breach of the *covenants* by reason of the wrongful competition of defendants through the instrumentality of Lektro-Vend Corp. as charged in the complaint (DAB 4, 5), and confirmed by the Appellate Court in the second appeal (App. B 293, 294). The others are new issues, with respect to which, if relevant to a corporate opportunity trial (as this Court undoubtedly believes), defendants have a right to be heard, to a day in court on them. This Court itself notes that the issue upon the second trial was for the narrow purpose of determining damages "*attributable to the breach of the covenants. . . .*" (Op. 8).

Questions relating to disclosure to Vendo of Stoner's belief in the FIFO principle, the reasonableness and finality of the $1.5 million selling price, Vendo's willingness to listen to Stoner, the roles of Stoner vis-a-vis Childers in the Lektro-Vend negotiations, are also relevant in this corporate opportunity issue. While some information on these points came out in the course of both trials, full evidence was never introduced because it was not relevant to the question of whether plaintiff was damaged by reason of the wrongful competition of defendants through the instrumentality of Lektro-Vend Corporation.

And consider the allegation of the amendment to the complaint this Court allowed "*in order to conform it to the proof*": that Stoner's actions were "for the development of an economically and functionally successful vending machine", etc. (Op. 11). Vendo never proved that allegation. On the contrary, it "had no interest in Lektro-Vend" though it had its actual sales figures (*ante* 4). We could easily have proved the falsity of that allegation *fully*. Further, the evidence that there is in this record

shows the contrary (*post* 21). By financial statements, and other evidence we could have proved that Lektro-Vend was not an "*economically and functionally successful vending machine.*" We were seriously prejudiced by being denied the opportunity to present this evidence, as this Court characterizes Lektro-Vend as a "successful machine" (Op. 1), "popular and successful with operators" (Op. 3) and "whose success was presumably due in some measure to the skills contributed by Phillips" (Op. 10).

Further, as we argued (DAB 55-57), the law is well settled that a plaintiff cannot shift to a new theory of liability after the first trial:

> "Likewise, a party may not try a case upon one theory and then present to the court on appeal, for the first time, another and different theory (citations omitted). The reasons for prohibiting, upon review, a change of the theory upon which a case has been tried, are apparent. *The proof presented is determined largely by the pleadings, the issues, and the theories there made.* To permit a recovery upon a theory which was neither pleaded nor presented *below*, would preclude the adverse party from presenting evidence in rebuttal thereof and from offering other further or attendant theories predicated thereon." [*Broberg* v. *Mann*, 66 Ill. App. 2d 134, 138 (2d Dist. 1965) *per Davis, J.*].

A fortiori does this rationale apply where, as here, the shift in theories occurred after an appellate court adjudication of liability *upon another ground*, and where defendants' protests to this effect were concurred in by that same Appellate Court, and where, as here, *fiduciary relationship was never pleaded* [*Belfield* v. *Coop*, 8 Ill. 2d 293, 309 (1965), *per Davis, J.*].

We relied upon settled rules of procedure with citations from this Court as to the law of the case upon remand, and shifting theories upon appeal; upon the doctrine that a party must present "the entire wealth of his case at once" and not try it piecemeal; and that all questions involving

the same subject matter open to consideration when litigation is presented to an appellate tribunal, which could have been presented and passed upon by that tribunal are *res judicata* whether raised or not (DAB 55-57).

And while we do not question the right of this Court to change the law on these settled rules of procedure, we do challenge the right of this Court, after the trial was had, to change the law of the case which was binding upon the trial court and the parties at the time the judgment was entered, and *affirm* that judgment on a claim of corporate opportunity, which was not within the scope of the mandate governing the trial and which was raised for the first time in this Court.

While this Court may *reverse* the Appellate Court here, due process requires that it reverse and remand the case for a new trial on the corporate opportunity claim, thereby granting the defendants an *opportunity* to defend against that corporate opportunity claim *"at a meaningful time and in a meaningful manner"* as the Due Process Clause commands [*Boddie* v. *Connecticut*, 401 U.S. 371, 378; 28 L. Ed. 2d 113, 119 (1971); *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66 (1965); *Saunders* v. *Shaw*, 244 U.S. 317, 319, 61 L.Ed. 1163, 1165 (1917, *per Holmes, J.*)]. Fundamental fairness requires no less. (Point VI *post*, pp. 30-35).

II.

THE ILLINOIS ANTITRUST DEFENSES AND COUNTERCLAIM DO NOT SEEK RETROACTIVE APPLICATION OF THE 1965 LAW. VENDO'S ANTI-COMPETITIVE ACTIONS IN 1965 AND LATER WERE ILLEGAL.

In its opinion relative to the Illinois Antitrust Law issue (Op. 12-13), rather than addressing itself to the question of preemption, on which the Appellate Court based its first decision (App. A 297), the Court disposes of the issue on the ground that the 1965 Antitrust law cannot be applied retroactively to a contract executed prior to its passage,

particularly "for constitutional reasons, where a criminal statute is involved"; and therefore "cannot properly form the basis of *a counterclaim. . . .*" (Op. 13).

The Court does not consider the prospective operation of the law and the validity of a counterclaim thereunder, which sought damages for acts of the plaintiffs only from 1965 on—for acts of monopoly, including the harassment of Lektro-Vend and the attempted enforcement of the covenants against Stoner and Stoner Investments; all *subsequent* to the effective date of the 1965 law.

The 1965 Illinois Antitrust Law became effective July 21, 1965. When this suit was commenced on August 10, 1965, it was brought to enforce anti-competitive covenants which that antitrust law made illegal. Such attempted enforcement is itself illegal and actionable. Further, apart from the attempted enforcement of the covenants, the monopolistic practices of Vendo, all occurring since 1965 as alleged in the Counterclaim, also state a cause of action under the 1965 Act. We respectfully submit that there is no question of retroactive application here.

As for the affirmative defense, (which this Court does not mention), as well as the counterclaim, the effect of the 1965 enactments was to invalidate existing contracts—just as the Robinson-Patman Act had invalidated the contract for brokerage commissions and made it unenforcible in *Merchants Service Corp.* v. *Libby McNeill & Libby*, 314 Ill. App. 121 (1st Dist. 1942) discussed by the Appellate Court in its first opinion (App. A 296).

No question of the impairment of the obligation of an antecedent valid contract exists because Vendo had no vested contract right to enforce rights under that contract which the legislature, in the exercise of its police power over intrastate commerce, saw fit to condemn. See *Merchants Service Corp.* v. *Libby McNeill & Libby*, 314 Ill. App. 121, 129-132 (1st Dist. 1942), cited by us (DB 37)

where the subject is thoroughly discussed. There, as here, the contract between the parties predated the statute, but the activities complained of occurred after the legislation.

As Mr. Chief Justice Hughes said in *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240, 307, 308; 79 L.ed. 885, 902 (1934):

> "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity,"

quoted in *Merchants Service Corp.*, 314 Ill. App. at p. 131. That contracts, though valid when made, cannot avoid the power of Congress in the exercise of its police power under the Commerce Clause to bring them within the Sherman Act was settled way back in 1899 in *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211, 229; 44 L.ed. 136, 143.

What this Court is saying, in depriving us of our remedy under the counterclaim, is that by the contracts at bar, executed prior to 1965, Vendo is immunized from liability for acts performed (as the counterclaim alleges) *after* the 1965 Act was passed, notwithstanding that the 1965 Act makes those acts *criminal* and gives a remedy for triple damages because of the gravity of those acts, in clear defiance of the public law of this State!!

In terms of this Court's opinion, the affirmative defense of invalidity under the Illinois Antitrust Law, which this Court overlooked, should apply to the anti-competitive activity of Vendo, after the passage of the Act, even though cloaked with an aura of fiduciary duty, which can not abrogate the public policy objection to restraints on competition. Therefore, the affirmative defenses and counterclaim under the Illinois Antitrust Law are well-pleaded and an opportunity for a hearing thereon should be afforded, as due process requires (See Point VI, *post*, pp. 30-35).

III.

THERE IS NO EVIDENCE OF A CAUSAL RELATIONSHIP BETWEEN STONER'S VIOLATION OF DUTY AND VENDO'S FAILURE TO HAVE FIFO; ON THE CONTRARY, VENDO'S EVIDENCE NEGATES ANY CAUSAL RELATIONSHIP.

While this Court discusses at length the basis of Stoner's liability for breach of fiduciary duty, it omits mention of any causal relationship between this breach and the "losses" sustained by Vendo. Nor does this Court comment upon the assumption underlying the expert's damage evidence, to-wit: that Stoner was responsible for Vendo not having FIFO. But by tacitly accepting this premise, it is submitted that this Court has been led into serious error, for as found by the Appellate Court, "(n)either the evidence in the first trial nor in the trial on remand establishes that Stoner was responsible for Vendo's failure to have FIFO" (App. B 291-293). The Appellate Court also correctly found that, "Vendo's failure to have a FIFO vending machine is not attributable to defendants" (App. B 294).

But the closest this Court comes to considering the all-important question of causal relationship is a disclaimer. The Court points out that the record "casts some doubt" on whether Phillips seriously entertained any intention of selling the Lektro-Vend design at all (Op. 6); that it is "unknown" whether Phillips might have been willing to sell the machine at a figure lower than $1,500,000 and acceptable to the plaintiff (Op. 9); the Court "cannot say" that Vendo would have declined to purchase Lektro-Vend or have developed a FIFO machine itself (Op. 10). The Court thus, without any evidentiary basis whatsoever, merely assumes that Vendo would have had Lektro-Vend or FIFO *but for* the actions of Stoner.

The Court, however, misunderstands or overlooks Vendo's own documents and witnesses which prove conclusively that Vendo would not have had FIFO or Lektro-Vend even if Stoner had not breached his fiduciary duties.[3] We urge the Court particularly to review the summary of the continuous interest and involvement of Vendo in FIFO, as detailed succinctly in DAB 22-31 and DAB 65-69. These undisputed facts convincingly show that Stoner had nothing whatsoever to do with Vendo's not having FIFO. The evidence is that Vendo knew about and wanted a FIFO machine but repeatedly rejected FIFO because of the collective judgment of its people that FIFO was too expensive to build, that it would have too high a selling price and that, therefore, there was not a sufficient market for FIFO to make its production profitable (See especially DX 227, pp. 3-4).

This is the very reason why it did not purchase Lektro-Vend or continue negotiations with the Phillips—not that the $1.5 million price tag was too high, but because Lektro-Vend would cost too much to produce. Its Research and Development Vice President, Boley Andrews, after examining the Lektro-Vend machine on January 16, 1963, objected to its high cost of manufacture and high selling price (See DX 11 and DX 11A, January 16, 1963). He repeated these objections in his memorandum following his second visit on February 4, 1963 (DX 12). On February 7, 1963, he again said:

> "In order to accomplish the above feature [FIFO], it turns out that the [Lektro-Vend] machine will have to fall in the $1,000 area, which, in my opinion, is entirely too high just for this particular feature.
>
> • • •

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[3] However, it should be repeated that defendants have never had an opportunity to fully present their own evidence in response to the new corporate opportunity theory.

> "[W]e are looking for ideas which will lead to a design of a candy machine having the above mentioned characteristics, but will have a standard cost increase of only $50.00 to $70.00 over the present drop shelf unit" (DX 13) (See also A. 306-09).

Its Sales Vice President John Burlington, testified:

> "I stated no, that I didn't think we should try [to acquire Lektro-Vend]."
>
> • • •
>
> "My opinion was then and has been for some time that they (Lektro-Vend) took the high-cost-route to accomplish first-in first-out, which in my mind is not economically a good route to go" (A. 1127).

It is difficult to comprehend how it is possible to say that Stoner was at fault for Vendo not buying Lektro-Vend or that Vendo did not have a "genuine opportunity" to purchase Lektro-Vend or develop FIFO on its own, after examining Vendo's records on the subject (See PX 27, 28, 29, 30, 31, 32 and 33; and DX 11, 11A, 12, 13, 14, 15, 16 and 19; and DX 227, 228, 229, 230, 231, 232 and 302). These were all documents from *Vendo's file.*

For the Court to state that our argument was that Vendo demonstrated a "lack of interest" in FIFO (Op. 10) reflects a misunderstanding of our argument and the Appellate Court's holding. Our point was simply that while Vendo always wanted a FIFO, it insisted on a low-cost unit comparable in price to the drop shelf—*a machine that neither it nor Lektro-Vend were able to design.*

If the only reason that Vendo did not purchase Lektro-Vend was the $1.5 million price (somehow caused by Stoner), as the Court implies, then Vendo could have immediately brought its own FIFO out of research and development since, *as its management pointed out* (PX 27-33 and DX 11-13), *the Vendo prototypes were similar to Lektro-Vend in cost and function.* But Vendo did not. In-

stead it continued to have its R&D department work on a design for a low-cost FIFO, which designs were discarded because the machine, like Lektro-Vend, would cost too much to produce.

Nor did lack of advice from Stoner play any role. Vendo knew of Stoner's belief in FIFO from his request in 1962 to be permitted to invest in Lektro-Vend and from his advice in early 1963 that the refusal to purchase Lektro-Vend was a "serious mistake" (PX 32). But Vendo ignored his advice and rejected Vendo's and Lektro-Vend's FIFOs because of their necessarily high selling cost.

The exhibits referred to also show that, contrary to this Court's opinion, Vendo's people did negotiate with Phillips and that Vendo was not "misled while [Stoner] was purportedly acting as plaintiff's agent" (Op. 9). For example, in DX 12, Andrews reported in detail on Vendo's examination of the Lektro-Vend machine and its negotiations with Phillips and Stoner on February 4, 1963. DX 12 states (p. 3): "*Mr. Stoner and Mr. Phillips* volunteered the information that *they* were negotiating with the Seeburg Corporation of Chicago, Illinois, in regard to the possible purchase of this machine, and are holding up *their* negotiations until such time as we make them an offer." In addition to showing that Phillips was negotiating directly with Vendo, this document shows Boley Andrews' awareness of Stoner's interest in the Lektro-Vend machine. Certainly Andrews did not think that Stoner was acting as plaintiff's (Vendo's) agent. (Contrast Op. 9).

At the first trial, Elmer Pierson testified:

> "I am talking about *the price Mr. Stoner and Mr. Phillips wanted for their product.* I thought Mr. Childers had negotiations with Mr. Stoner regarding acquisition of the Lektro-Vend machine." (A. 197).

Contrary to the Court's inference that the FIFO ship had already sailed,(*) this all took place at a time when few FIFOs were on the market and Vendo would have been able to get an early foothold if FIFO were as important as Vendo now contends. In face of this record, it strains credulity to claim that Vendo would have purchased Lektro-Vend in 1962 or 1963 or thereafter (Op. 10), if Stoner had more adequately disclosed his financial backing of it. Vendo's failure to develop its own FIFO or acquire Lektro-Vend was due solely to its own business judgment of what would *sell* on the market, not lack of advice or inadequate disclosure from Stoner as the evidence coming *solely* from Vendo conclusively demonstrates (*ante*, pp. 17-19).

Vendo's market share would have declined even if it had owned Lektro-Vend.

This Court admitted that it was an "assumption" (p. 14), a "proposition" (p. 14), or a "theory" (p. 14), that "if plaintiff had had the Lektro-Vend, it would have continued to hold the same market share that it had before the defendants entered the market" (p. 14). However, it can point

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(*) The Court states that:

> "The instances in which plaintiff, after *1962*, failed to develop such a machine seem in part to be explained by a concern that several other companies had by then developed similar machines and that it might be too late for plaintiff to successfully enter the market" (Op. 10).

This betrays a misunderstanding of the facts. The Lektro-Vend machine was not even exhibited until October, 1962, and during the entire year of 1963—after Stoner had informed Vendo he wanted to participate in Lektro-Vend and after the unsuccessful attempts of Vendo to buy Lektro-Vend, only 562 FIFO's were sold; none were sold prior to that (PX 108). ***Vendo's R&D Vice President estimated in 1963 that Vendo could have been on the market with a FIFO in 17 months.*** (DX 15). Vendo's testimony that it at one time decided against FIFO because of Vendo's late start referred to the period after ***1965, not 1962.*** (A. 929, 934 [Pierson], A. 1022 [Rose]).

to no evidence in the record to support that proposition for there is none.

It is apparent that underlying the Court's acceptance of this "assumption" or "theory" is its belief that Lektro-Vend was a successful machine. The Court refers to the Lektro-Vend machine as a "successful" vending machine, "superior to the older and less satisfactory model produced by Plaintiff" at five places in its opinion (pp. 1, 3, 5, 8, 10). This assumption is the keystone upon which the opinion rests, *completely belied by the evidence coming solely from Vendo.*

Even had Vendo had the Lektro-Vend FIFO machine, it would not have been able to get the same 30% market share it averaged for all products other than candy (non-CPS), for the basic reasons its own people had set forth in urging Vendo not to acquire Lektro-Vend—Lektro-Vend's selling price was too high and its market potential too low. (*ante*, pp. 17-18).

That they were right is borne out by the subsequent experience of Lektro-Vend. It was Automatic Products which produced a lower cost machine (A. 783, 960), that by Vendo's own statistics, acquired 90 percent of the FIFO market (A. 1032; DX 203, p. 4). According to Vendo's statistician Forney, it outsold Lektro-Vend "about 15 to 1" (A. 821). As recognized in Vendo's brief (PB 36), Lektro-Vend was of only minor consequence in the FIFO candy machine market, accounting for about 3% of the total machines sold during 1964-69 (DX 203, p. 4).

The incongruity of awarding Vendo $7 million damages for lost *profits* because it did not have Lektro-Vend, as contrasted with Lektro-Vend *gross sales* of $7 million, strongly suggests that Vendo's losses were due to other causes than its failure to have Lektro-Vend. It is obvious, as Vendo's research and development people had contended

all along, that Lektro-Vend was not the *panacea* (*ante*, pp. 17-18).

The Restatement of Trusts (2d) §205 is in point here. It states:

> "f. *Loss not resulting from breach of trust.* As is stated in Clause (a), a trustee is liable for a loss resulting from a breach of trust. A question may arise, therefore, as to the causal connection between the breach of trust and the loss. If the trustee commits a breach of trust and if a loss is incurred, the trustee may not be chargeable with the amount of the loss *if it would have occurred in the absence of a breach of trust.*"

Therefore, the record makes clear that Vendo would have sustained a continuing decline in its market share (that had already been on the decline from 70% in 1955 during Stoner's pre-acquisition management), whether the Lektro-Vend machine was on the market or not and whether Lektro-Vend was owned by Phillips or by Vendo. Such losses would have been sustained even in the absence of Stoner's breach.

IV.

THE DAMAGES AWARDED ARE NOT BASED ON PROBATIVE EVIDENCE.

A. Vendo's Market Survey On Which All The Expert Testimony Was Founded Was Not Probative Evidence And Should Be Disregarded.

The keystone for the experts' testimony that Vendo's damages were due to its failure to have FIFO was Forney's market survey report (PX 113, 114, 115) from which he concluded that 67% of all CPS units sold *in 1969* were FIFO (DAB 36).

Vendo's survey, however, by Forney's own admission, twice repeated in testimony (A. 776, 779, 808-9) and twice explicitly stated in reports he wrote (PX 114, p. i.; DX

203, p. 1), did not include a sufficient number of street operators, who represent 40 to 50% of the total customers in the candy vender market (DAB 38). The Appellate Court duly noted this defect (App. B 293).

Thus, the survey ignored 40 to 50% of the candy vender market. This is critical because industrial operators are likely to be FIFO users, whereas street operators are not (DAB 34). Thus the FIFO estimate based on the survey was double the true percentage.

In contrast to Forney's estimate based on Vendo's sales, Vice-President Rose made an estimate of the FIFO penetration of the market for the years 1966, 1967, and 1968. His estimate was that FIFO sales constituted only 30% of the sales by the year 1968 (DAB 38-39).

This difference is determinative since if FIFO's penetration was only 30% in 1968, as Rose testified, Nicholson could not have drawn the conclusion that not having FIFO was the cause of Vendo's decline in the total CPS market and therefore could not have awarded Vendo its (fictional) non-CPS market share. Nicholson admitted that if FIFO were not "a very important part of the market, his opinion would be different" (A. 915-16).

This Court ignores this defect in Vendo's proof on the ground that defendants did not object to the admission of the survey at the trial. But a survey that is biased toward industrial (pro-FIFO) operators has *no probative value* as to what the preference for FIFO is on the total market (DAB 69-72) [See *American Luggage Works* v. *U.S. Trunk Co.*, 158 F. Supp. 50, 53 (D. Mass. 1957); *Bank of Utah* v. *Commercial Sec. Bank*, 369 F. 2d 19, 27 (10th Cir. 1966)]. No objection need be lodged where the evidence *proves nothing.*

It is elementary that before a survey proves anything it must include the "universe", in this case the entire candy,

pastry and snack market, as we pointed out citing controlling authority (DAB 70-72). Further Forney's estimates based upon the survey were ineradicably tainted by their admitted partisan character; made "for the Vendo theory of this litigation", "they had no other real purpose." Compare *Sears Roebuck & Co.* v. *AllState Life Ins. Co.*, 246 F.2d 161, 171-172 (5th Cir., 1957), cited by us (DAB 72).

Although technically the survey was not objected to, is justice served by urging this technicality to support a large award of damages, the primary predicate for which is a survey *manifestly erroneous as such* and tainted with an admittedly partisan character, particularly where, as here, the estimates (PX 107, 108) based on such survey and the experts' testimony based upon such estimates were objected to (PX 129-8, 8A, 9; A. 763-67, 839-40, 877)?

B. Vendo's Market Decline Did Not Result From Its Not Having FIFO. Vendo's Decline Continued A Downward Trend That Had Developed Before The Stoner Acquisition. This Downward Trend Was Due To The Entry Of New Competitors.

From Vendo documents and witnesses, Defendants demonstrated why Vendo's "market position" declined between 1959-1969—this decline was not attributable to lack of FIFO (DAB 47-52, 66-69).

One of the reasons for the decline was given by Vendo's Chairman himself—the entry of new competitors in the market. Stoner's share of the candy market[5] had fallen from 71% in 1955 to 30.6% in 1959. (This 1959 figure by coincidence was roughly the same as Vendo's "non-CPS market share," a coincidence which gives a surface plau-

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(5) Which constituted 80% of the CPS market (DAB 47), and which was the only segment of Vendo's CPS market to decline during 1962-69 (DAB 47).

sibility to Vendo's 30% market share claims.) And after the acquisition, Vendo's candy market share declined from 30.6% in 1959 to 23.4% in 1962 (units), from 34.1% in 1959 to 23% in 1962 (dollars), even though no FIFOs were sold during this period (DX 207, Att. 2, 3). Vendo's Chairman testified in detail that these declines, before 1963, were due to entry of more competitors into the industry (A. 188-189). Forney confirmed this (A. 797-8).

While Forney estimated FIFO's share of the CPS market to have risen from 5% in 1964 to 67% (units), 82% (dollars) in 1969, Vendo's CPS market share in those years declined only 5%—from 21% in 1964 to 16.6% in 1969.

Thus, Vendo's market decline was not due to the entry of FIFO on the market, but was part of a continuing decline from 1955 on that was due to the entry of new competitors in the market.

This evidence also refutes Nicholson's assumption that Vendo's share of the CPS and non-CPS markets should correspond since Vendo's CPS share did decline steadily after acquisition and long before FIFOs were sold in quantity (1959-1964).

Also, during this period, Vendo experienced serious quality control problems which, according to Forney's 1969 survey, were the worst in the industry (DAB 50-52, 66-69). And Forney's survey indicated that the prime concern and most desirable attribute sought by a prospective vending machine purchased was good quality, rather than FIFO (PX 114, ii. 4, 6). Automatic Products, while having FIFO, also had excellent quality (PX 114, 6-8). Vendo's losses, therefore, were due to its poor quality, not the fact that it did not have a FIFO in its line.

C. The Damages Affirmed Were For The Period Of The Covenants (Ten Years), The Validity Of Which Covenants This Court Did Not Decide. Vendo Had A Duty To Mitigate Its Damages.

It was improper to affirm an award of damages for lost profits up to June, 1969, and a further award for diminution in the value of Vendo's business as of 1969, unless this Court were to consider and decide the question whether the covenants not to compete were valid for ten years. The Appellate Court, and the experts who studied its opinion, fixed that time frame in terms of the ten year period of the covenants. But this Court never approved the covenants, nor considered our argument about their patent and fatal defects (DB 40-56). Instead, it predicated liability upon a finding that defendants breached a fiduciary duty and affirmed the damages awarded on a theory of corporate opportunity, wholly ignoring the obvious fact that the damage time-period reflected an entirely different basis of liability. Stoner's fiduciary obligation ended June 1, 1964.

We submit that justification of a damage award for said time period requires an analysis and determination of the validity of the covenants, and a finding of whether or not they were breached during the time period in which they may have been valid. That such covenants were invalid as to Stoner Investments after October 1962 and as to Stoner after June 1964 was amply demonstrated in our briefs (DB 56).

Furthermore, whether the liability of the defendants is based on breach of valid covenants or on breach of a fiduciary obligation, the plaintiff Vendo was not entitled to sit idle. It must use reasonable efforts to avoid the consequences. As we pointed out in DAB 80, the damages here awarded are excessive, because a plaintiff must act with reasonable diligence to mitigate damages which it knows

it is incurring. This Court has stated that this doctrine of avoidable consequences is applicable in every type of case where money damages are authorized. When it discovered that FIFO was commercially important, and certainly no later than when it brought suit in 1965, Vendo should have developed its own machine, not waited five or six years.

V.

ASSUMING ARGUENDO THAT THE FACTS IN THE RECORD SUPPORT THE DOCTRINE OF CORPORATE OPPORTUNITY, THE JUDGMENT IS NOT BASED UPON THE CORRECT MEASURE OF DAMAGES IN CORPORATE OPPORTUNITY CASES.

Although we have not been heard on all the facts as to the breach of the fiduciary duty on the part of a *noncontrolling director* sufficient to give rise to the corporate opportunity doctrine (*ante*, pp. 10, 11), we will assume, *arguendo*, the facts in this record which this Court deemed sufficient to apply that doctrine. Still, the measure of damages resulting from the appropriation of a corporate opportunity is not "*only* ($7,345,000) the profits which plaintiff lost through its failure to have the Lektro-Vend in its own product line" (Op. 10),—*the only measure recognized by law is the profit made by the director in the seized opportunity.* As this Court clearly points out, quoting from *Kerrigan* (Op. 10, 11):

> ". . . if the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations. If directors fail to make such a disclosure and to tender the opportunity, the prophylactic purpose of the rule imposing a fiduciary obligation requires that the directors *be foreclosed from exploiting that opportunity on their own behalf.*" ..... Ill. 2d at .....

In one of the cases cited by this Court (Op. 10) as to "the fiduciary duties of officers and directors," *Paulman* v. *Kritzer*, 74 Ill. App. 2d 284, 289-295 (2nd Dist., 1966) "which was specifically endorsed by this Court in our affirmance of that decision" (38 Ill. 2d 101, 104), the measure of damages was the *profit* the faithless officer derived from the seizure of the corporate opportunity. Speaking of the corporate opportunity doctrine, Mr. Justice Davis said in *Paulman* (74 Ill. App. 2d at 291):

> "The rule, described as inveterate and uncompromising in its rigidity, rests upon the broad foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of *profit* flowing from a breach of the confidence imposed by the fiduciary relation." (Citations omitted.)

The other case cited (Op. 10), *Lerk* v. *McCabe*, 349 Ill. 348, 362 (1932) did not involve the measure of damage applicable to the doctrine of the appropriation of a corporate opportunity.

Thus, in all the corporate opportunity cases cited by the Court and all other corporate opportunity cases which have come to our attention, the damages awarded were based on the disgorgement of the profit made by use of the opportunity, i.e., an accounting. 3 Fletcher, *Corporations*, §§856, 861.1, 884 (perm. ed.).

As stated in *Dwyer* v. *Tracey*, 118 F. Supp. 289 (N.D. Ill. 1964):

> "The defendant as a fiduciary was bound to act in accordance with this contractual standard. Any activity in violation of it constituted a breach of trust and he held the profits as trustee for the debtor corporation." (p. 296)

See also, 13 I.L.P., *Corporations* §325; *Mile-O-Mo Fishing Club, Inc.* v. *Noble*, 62 Ill. App. 2d 50, 58 (5th Dist. 1965): *Flynn* v. *Zimmerman*, 23 Ill. App. 2d 467, 476 (2d Dist.

1960); *Voss Oil Co.* v. *Voss*, 367 P. 2d 977, 980 (Wyo. 1962); *A. Hollander & Son* v. *Imperial Fur Blending Corp.*, 66 A. 2d 319, 326 (N.J. 1949). These damages are based on the business diverted to the defendant, that is, the profit made by the defendant by use of the opportunity, profit which, presumably, would have otherwise been plaintiff's. *Never do courts in corporate opportunity cases award the corporation profits lost to the corporation which are not related to the business done by the defendant in the use of the opportunity.* This Court remanded *Kerrigan* for precisely that determination: "an accounting for the profits made by the defendants" (p. 10).[6]

As the Court points out (Op. 10), Lektro-Vend sales in the entire period to 1969 were only $7,000,000. The loss to Vendo as a result of the "seized opportunity" would be only a small fraction of that sum. Moreover, Vendo was not interested in the seized opportunity: "It had no interest in Lektro-Vend" (*ante*, p. 4). Further, the seized opportunity was of only minor consequence in the FIFO candy machine market, being but 3% of the total machines sold during 1964-1969, and outsold by its competitor, Automatic Products, at about 15 to 1 (A. 821), per Vendo's own statistician, Forney (*ante*, p. 21). Yet the award to Vendo was more than Lektro-Vend's gross sales. Also, corporate opportunity damage awards give credit in the accounting for the expenditures made by the defendant from his own funds in developing the opportunity (*Mile-*

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[6] Yet, with the cruelest of ironies, this Court distinguishes *Kerrigan* on the basis that defendants' conduct was not as grievous as that involved in *Kerrigan*: "that defendants here did not use any funds or facilities belonging to plaintiff; that the opportunity to create the Lektro-Vend machine was not presented to Stoner as an officer or director of plaintiff; and that he did not use his position with plaintiff to create leverage for the Lektro-Vend project, whose success was presumably due in some measure to the skills contributed by Phillips" (Op. 10).

O-Mo Fishing Club, Inc. v. *Noble*, 62 Ill. App. 2d 50, 58 (5th Dist. 1965), (*per Goldenhersh, J.*).

We know of no case involving the appropriation of a corporate opportunity by a director where the measure of damages was different from these well settled rules and this Court has cited none. Thus, this Court, applying the doctrine of appropriation of a corporate opportunity, has misapplied the measure of damages.

VI.

DEFENDANTS HAVE BEEN DENIED DUE PROCESS OF LAW CONTRARY TO SECTION 2 OF ARTICLE I OF THE CONSTITUTION OF ILLINOIS AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE BENEFIT AND PROTECTION OF WHICH DEFENDANTS HEREBY INVOKE AND CLAIM.

By this Court's judgment, we have been deprived of both procedural and substantive due process. Due process and equal protection may be denied by the judicial as well as by the executive or legislative branches of state government [*Shelly* v. *Kraemer*, 334 U.S. 1, 14-18, 92 L. Ed. 1161, 1180-83 (1948)].

A. Procedural Due Process.

This question arises for the first time in and as a result of this Court's judgment, and it is now properly raised in this Petition for Rehearing. [*Saunders* v. *Shaw*, 244 U.S. 317, 320, 61 L.Ed. 1163, 1165-66 (1917) (*per Holmes, J.*); *Missouri* v. *Gehner*, 281 U.S. 313, 320, 74 L.Ed. 870, 875-76 (1930)]. Certainly we were not bound to anticipate that this Court would affirm a judgment on a corporate opportunity doctrine when it was clear in our briefs that we relied upon well settled Illinois law governing the trial and appeal of cases (DAB 53-60).

And certainly we were not bound to anticipate that this Court, after denying leave to appeal from the judgment and mandate of the Appellate Court which controlled the law of the case upon retrial, would

> (1) change that law after the fact of trial (not to mention those *other* settled Illinois principles of procedure governing the trial and appeal of cases);
>
> (2) permit the complaint to be amended in this Court and
>
> (3) then *affirm the judgment entered upon retrial* upon a new theory of appropriation by a director of a corporate opportunity,

without reversing and remanding the case, thereby giving us an opportunity to be heard in a trial court upon the law and the facts that new theory posed. [*Missouri* v. *Gehner*, 281 U.S. 313, 320, 74 L. Ed. 870, 875, 876 (1930); *Saunders* v. *Shaw*, 244 U.S. 317, 320, 61 L. Ed. 1163, 1165-66 (1917)].

That we have been denied procedural due process, we submit, is obvious. (Point I, *ante*, p. 2). In speaking of procedural due process, the Court said in *Boddie* v. *Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 119 (1971):

> "What the Constitution does require is 'an *opportunity*' . . . granted at a meaningful time and in a meaningful manner," (citing *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 14 L.Ed. 2d 62, 66 (1965). (Emphasis in original).

While the facts of all cases differ, can this Court say that we have been granted an opportunity at a meaningful time and in a meaningful manner to defend against a corporate opportunity claim, with all its ramifications of law and fact? (See *ante*, p. 2).

Boddie cited *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965), where it was held that the mere opportunity to offer evidence in support of a motion to vacate a decree was insufficient; that due process was

satisfied ". . . only by granting this motion to set aside the decree and consider the case anew." Unlike *Armstrong*, defendants have been denied entirely the right to introduce evidence *in a trial court* bearing upon the issues involved in a corporate opportunity case(*ante*, p. 13). We are left merely to argue on rehearing that this Court has misapplied the corporate opportunity doctrine. When Armstrong made his motion to vacate the decree, he knew it was an adoption case. While Vendo's brief here briefly sketched it *for the first time* (PB 50, 51) *after over nine years of litigation*, we didn't know it was a corporate opportunity case until this Court delivered its opinion.

In *Saunders* v. *Shaw*, 244 U.S. 317, 319, 61 L. Ed. 1163, 1165 (1917), the Supreme Court of Louisiana, based upon an intervening decision of the United States Supreme Court (*Myles Salt*) reversed on rehearing a prior judgment without affording an intervening defendant an opportunity to put in his proof. There the facts were uncontroverted. They would be controverted here in a corporate opportunity case (*ante*, pp. 10-11). In reversing on the Fourteenth Amendment ground of denial of due process, Mr. Justice Holmes said (244 U.S. at 319):

> "Probably the majority of the supreme court (Louisiana) thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. case that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

Thus our contention here is scarcely "an artificial analysis" (Op. 11). However one phrases it, the naked facts are that we have not had an opportunity to put our evidence in on the corporate opportunity claim or to argue

before the fact of decision *in a trial court* the law on corporate opportunity as applied to those facts.

B. Substantive Due Process.

We argued this point in our brief (DB 38-40). We argued that because the trial court held that it had *no jurisdiction* to hear our claims because of Article VI (preemption), we had been denied substantive due process under both the Illinois and the United States Constitutions, because those claims, involving solely *intra-state commerce* had not been heard *on their merits* (DB 38). The Appellate Court in both appeals agreed with the trial court (Op. 13).

Though we argued fully here that preemption did not apply (DB 28-37), this Court misconstrued the argument to be one of whether the first opinion of the Appellate Court was based upon preemption or upon "the inapplicability of the Illinois Act because of the absence of a substantial impact in Illinois arising out of the acts complained of" (Op. 13), when *there never was any hearing on the facts* relating to such impact, and the counterclaim alleged acts which showed a *substantial* impact (A. 15-19).[7]

Instead of deciding the constitutional issues we posed, this Court preferred to dispose of them on another ground, namely, that the 1965 Act, enacted "long after the contracts in question were entered into, cannot properly form the basis of a counterclaim by defendants", because statutes are not normally construed as retroactive, particularly "where a criminal statute is involved" (Op. 13). This

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[7] Actually, what the Appellate Court held was that preemption *applied* rendering it *not* "necessary to consider *the merits* of the defenses and counterclaim" (App. A 297), adding, contrary to the record (A. 15-19), that "nowhere have the defendants pleaded or argued that the commerce involved here is anything but *interstate* (App. A 298).

Court *completely overlooks* the fact that the counterclaim alleged acts committed by Vendo *after* the passage of the 1965 Act (A. 17-19) which acts that Act made *criminal.* No retroactive application is required to test the legality of those post-statute acts. See Point II, *ante*, pp. 13-15, where the governing law is discussed.

The effect of the Court's opinion is to completely read out of the law of this State, insofar as defendants are concerned, a plain, unambiguous statute giving them a right of action for damages sustained as a result of wrongful acts contrary to the declared public policy and contrary to the plain words of the statute. While due process will abide errors of law and incorrect decisions, it will not abide a State Court construing a state statute where, as here, (and this with all deference) it "amounts to mere arbitrary or capricious exercise of power or is in clear conflict with the fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights" 16 Am. Jur. 2d, *Constitutional Law*, §553, p. 957; *Truax* v. *Corrigan*, 257 U.S. 312, 332, 66 L.Ed. 254, 263 (1921); *Wood* v. *Covenant Lake Park, Inc.*, 386 F. 2d 121, 124 (3d Cir. 1967); *Rudder* v. *U. S.*, 226 F. 2d 51, 53 (D.C.Cir. 1955). Or, as Judge Will stated in *United States ex rel. Keating* v. *Bensinger*, 322 F. Supp. 784, 786 (N.D.Ill. 1971):

> "When, however, a right is given by a state legislature, even though it is not a right guaranteed by the federal constitution, the arbitrary denial of that right violates the Fourteenth Amendment" (citing cases).

And, as Mr. Chief Justice Taft, paraphrasing the words of Daniel Webster, said in *Truax*, 257 U.S. at 332:

> "The due process clause requires that every man shall have the *protection* of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds *not arbitrarily or capriciously,* but upon inquiry, and renders judgment only

> after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

It is the decision of this Court, final in its nature, construing a plain statute affording us a right so as to deny us that right that constitutes a denial of due process of law under the Fourteenth Amendment. [*cf, Concordia Fire Ins. Co.* v. *People,* 292 U.S. 535, 549, 78 L. Ed. 1411, 1420 (1934)]. We raised this point throughout this litigation (DB 38-40).

CONCLUSION

We are duly grateful for leave granted by this Court to extend the time for filing and for enlargement of this Petition, thereby enabling us to present these matters adequately. We submit them with all deference to this Honorable Court and respectfully pray that this Petition be granted.

Respectfully submitted,

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APPENDIX H

NOTICE OF ORDER FROM CLERK
OF THE ILLINOIS SUPREME COURT
DENYING REHEARING ON
NOVEMBER 27, 1974

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

JUSTIN TAFT
CLERK

TELEPHONE
AREA CODE 217
782 2035

November 27, 1974

DEC 2 - 1974

Boodell, Sears, Sugrue,
Giambalvo & Crowley
Attorneys at Law
One IBM Plaza
Room 2650
Chicago, Illinois 60611

Nos. 46228 - The Vendo Company, a Missouri corporation, appel-
46231 lee, vs. Harry B. Stoner, et al., etc., appel-
Cons. lants. Appeal, Appellate Court, Second District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause. A copy of page ten of the opinion as modified is enclosed.

Very truly yours,

Clerk of the Supreme Court

APPENDIX 1

PAGE 10 OF ORIGINAL ILLINOIS SUPREME COURT OPINION FILED SEPTEMBER 27, 1974 AND FINAL PAGE 10 AS MODIFIED ON DENIAL OF REHEARING ON NOVEMBER 27, 1974

ORIGINAL PAGE 10

fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf." -- Ill.2d at ---.

See also the discussion of the fiduciary duties of officers and directors by the appellate court in *Paulman v. Kritzer* (1966), 74 Ill. App. 2d 284, 289-295, which was specifically endorsed by this court in our affirmance of that decision. *Paulman v. Kritzer* (1967), 38 Ill.2d 101, 104; *cf. Lerk v. McCabe* (1932), 349 Ill. 348, 360-362; Restatement (Second) of Agency secs. 387, 389, 391, 393, 394 (1958).

*** The relief sought in *Kerrigan* included an accounting for the profits made by defendants and the imposition of a constructive trust on the shares of stock which defendant held in the insurance agency. There are factual differences in the present case which might make such equitable relief inappropriate, in that the defendants here did not use any funds or facilities belonging to plaintiff, that the opportunity to create the Lektro-Vend machine was not presented to Stoner as an officer or a director of plaintiff, and that he did not use his position with plaintiff to create leverage for the Lektro-Vend project, whose success was presumably due in some measure to the skills contributed by Phillips. In any event, plaintiff here is not seeking recovery of the profits earned by Lektro-Vend, which is not even a party to the litigation, but only the profits which plaintiff lost through its failure to have the Lektro-Vend in its own product line. ***

Defendants repeatedly state that the failure of plaintiff to develop a FIFO-type machine showed a lack of interest on its part. We have reviewed the testimony and we conclude that plaintiff did have and retained an interest in having such a machine. Its failure to develop one itself initially rested on problems in the design of the particular model which had been developed. The instances in which plaintiff, after 1962, failed to develop such a machine seem in part to be explained by a concern that several other companies had by then developed similar machines and that it might be too late for plaintiff to successfully enter the market. We are not called on here to review the business prudence of plaintiff's decisions, however, and we cannot say that plaintiff would have declined an offer to purchase the Lektro-Vend, with its advanced technology, or to seek to develop such a machine itself had a genuine opportunity to do so been extended to it.

Defendants assert that the evidence introduced by plaintiff on the remand and the theory on which it was offered did not comport with the law of the case as established by the first opinion of the appellate court nor with the court's mandate. Plaintiff disputes defendants' interpretation of the first opinion of the appellate court. We need not consider this point, however, since the doctrine of the law of the case is not applicable to this court in reviewing the judgment of the appellate court.

> fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf." —— Ill.2d at ———.

See also the discussion of the fiduciary duties of officers and directors by the appellate court in *Paulman v. Kritzer* (1966), 71 Ill. App. 2d 284, 289-295, which was specifically endorsed by this court in our affirmance of that decision. *Paulman v. Kritzer* (1967), 38 Ill.2d 101, 104; *cf. Lerk v. McCabe* (1932), 349 Ill. 348, 360-362; Restatement (Second) of Agency secs. 387, 389, 391, 393, 394 (1958).

*** Plaintiff was not, as defendants urge, limited to the recovery of the profits which accrued to Lektro-Vend. (See Restatement (Second) of Agency secs. 399, 401, 407 (1958).) The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk. For if his misconduct were discovered the most that he could lose would be the profit gained from his illegal venture; the law would have operated only to restore him to the same position he would have been in had he faithfully performed his duties. ***

Defendants repeatedly state that the failure of plaintiff to develop a FIFO-type machine showed a lack of interest on its part. We have reviewed the testimony and we conclude that plaintiff did have and retained an interest in having such a machine. Its failure to develop one itself initially rested on problems in the design of the particular model which had been developed. The instances in which plaintiff, after 1962, failed to develop such a machine seem in part to be explained by a concern that several other companies had by then developed similar machines and that it might be too late for plaintiff to successfully enter the market. We are not called on here to review the

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APPENDIX J

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, the following provisions:

Article VI.

• • •

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

• • •

Amendment XIV.

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

ILLINOIS ANTITRUST ACT OF 1965

Illinois Revised Statutes, 1971, Chapter 38, the following sections:

60-1. *Short title.*] § 1. This Act shall be known and may be cited as the Illinois Antitrust Act.

60-2. *Purpose.*] § 2. The purpose of this Act is to promote the unhampered growth of commerce and industry throughout the State by prohibiting restraints of trade which are secured through monopolistic or oligarchic practices and which act or tend to act to decrease competition between and among persons engaged in commerce and trade, whether in manufacturing, distribution, financing, and service industries or in related for-profit pursuits.

60-3. *Violations—Enumeration.*] § 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacturing, mining,

sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);

c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade, or commerce; or

(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce; or

• • • • •

60-4. *Definitions.*] § 4. As used in this Act, unless the context otherwise requires:

"Trade or commerce" includes all economic activity involving or relating to any commodity or service.

"Commodity" shall mean any kind of real or personal property.

"Service" shall mean any activity, not covered by the definition of "commodity," which is performed in whole or in part for the purpose of financial gain.

"Service" shall not be deemed to include labor which is performed by natural persons as employees of others.

"Person" shall mean any natural person, or any corporation, partnership, or association of persons.

• • • • •

60-7. *Civil actions and remedies.*] § 7. The following civil actions and remedies are authorized under this Act:

. . .

(2) Any person who has been injured in his business or property, or is threatened with such injury,

by a violation of Section 3 of this Act may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who has committed such violation. If, in an action for an injunction, the court issues an injunction, the complainant shall be awarded costs and reasonable attorney's fees. In an action for damages, if injury is found to be due to a violation of subsections (1) and (4) of Section 3 of this Act, the person injured shall be awarded three times the amount of actual damages resulting from that violation, together with costs and reasonable attorney's fees. If injury is found to be due to a violation of subsection (2) or (3) of Section 3 of this Act, the person injured shall recover the actual damages caused by the violation, together with costs and reasonable attorney's fees, and if it is shown that such violation was willful, the court may, in its discretion, increase the amount to be recovered as damages up to a total of three times the amount of actual damages.

• • • • •

60-7.9. *Action not barred as affecting or involving interstate or foreign commerce.*] § 7.9. No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce. Added by P.A. 76-208, § 1, eff. July 1, 1969.

• • • • •

60-11. *Construction of federal anti-trust law.*] § 11. When the language of this Act is the same or similar to the language of a Federal Anti-trust Law, the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Courts.

ILLINOIS ANTITRUST ACT OF 1891

Illinois Revised Statutes, 1963, Chapter 121½, the following sections:

TRUSTS, POOLS, COMBINES, ETC.

AN ACT to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines, and mode of procedure, and rules of evidence in such cases. Approved June 11, 1891. L. 1891, p. 206.

Transferred from Chapter 38, Criminal Code, §§ 569-576.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

301. *Trust, or combination to fix the price, or limit quantity of any article, etc.*] § 1. If any corporation organized under the laws of this or any other state or county, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership, or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment, as provided in this act.

• • • • •

305. *Contracts in violation of act.*] § 5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

SUPREME COURT, U. S.

FILED

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-897

HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware Corporation,

Petitioners,

vs.

THE VENDO COMPANY, a Missouri Corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

INTRODUCTION

Petitioners have urged this Court to consider constitutional issues raised as an afterthought subsequent to a unanimous opinion of the Illinois Supreme Court written by Justice Walter V. Schaefer.

We propose to demonstrate in this Brief:

(1) That Petitioners have failed to meet the jurisdictional requirements necessary to a grant of this Petition;

(2) That the decision of the Illinois Supreme Court is well-considered, thorough and amply supported by the Record.

STATUTE INVOLVED

110 A Ill. Stat. Ann. §367

"Rehearing In Reviewing Court

"(a) *Time; Length.* A petition for rehearing may be filed within 21 days after the filing of the opinion, unless on motion the time is shortened or enlarged by the court or a judge thereof. Motions to extend the time for petitioning for rehearing are not favored. Unless authorized by the court of a judge thereof, the petition shall not exceed 20 pages if printed or 27 pages if not printed.

"(b) *Contents.* The petition shall state briefly the points claimed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the record and brief relied upon, and with authorities and argument, concisely stated in support of the points. Reargument of the case shall not be made in the petition."

STATEMENT OF THE CASE

Respondent prefers to present the relevant facts according to the issues raised by Petitioners, thusly:

I. The Pleadings And Proof Of Breach Of Fiduciary Duty.

The original complaint was filed August 10, 1965, which alleged, among other things, that Petitioner, Stoner, executed an employment contract with Vendo and that he "breached his duties and obligations thereunder. . . ." (Vol. I, A. 4).

In his First Counterclaim Stoner admitted that he was an employee of Vendo from 1959 to 1964 "and nominally the president of the Stoner Mfg. Co. division." (Vol. I, A. 6)

After some discovery, Count I of the Complaint was amended in part to further allege "that [Stoner] during the term of his employment, and thereafter, through the provision of financing, advice and use of facilities, entered into the vending machine manufacturing business with Lektro-Vend" (Vol. I, A. 44).

On December 16, 1966, the trial judge delivered his opinion upon the conclusion of the first trial. He made specific reference to Stoner's fiduciary duties and obligations, exploring "whether or not the conduct of the individual defendant is consistent with his obligations as a director." (Vol. I, A. 485)

In arguing the Motion to Vacate on May 12, 1967, Stoner's attorney made repeated references to the evidence of fiduciary duty, including an acknowledgment that "I know we somehow got involved in the fiduciary duties of a director generally." (Vol. I, A. 496. See also A. 497, 500, 508, 511).

He specifically acknowledged that the $250,000.00 judgment against Stoner was based on the fact that Stoner was found to be a "faithless director." (Vol. I, A. 500)

In his brief on the first appeal Stoner argued that "Stoner's Employment Contract Alone Determined The Scope Of His Fiduciary Duties. Vendo Is Bound By Its Terms." (Docket No. 68-1, Appeal to the Appellate Court of Illinois, Second District, Appellant's Brief, p. 80).

The Appellate Court, Second District, held following the first trial:

> "At the outset, we agree that such a breach of Stoner's fiduciary undertaking as an employee in the instant case requires a forfeiture of salary during the period that the breach was occurring."
> (Pet. App. B 288)

Following the second trial, and during the appeal to the Illinois Supreme Court, Petitioner argued in its brief that "Vendo Changed The Theory Of Its Case Upon Remand, Contrary To The Law Of The Case As Announced In The First Appeal. The Judgment Was Outside The Issues Framed By The Pleadings." (Docket Nos. 46228, 46231 Consolidated In The Supreme Court Of Illinois, Appellee's Brief, p. 53). As Petitioners have admitted here, they *did not argue to the Illinois Supreme Court that a possible violation of due process was at issue.*

The Illinois Supreme Court addressed that issue:

> "Defendants also urge that the plaintiff has impermissibly changed the theory of its case from that on which it relied in the first trial. We think that defendants' contention represents an artificial analysis. In some situations there could be, of course, a violation of a covenant not to compete without the breach of a fiduciary duty, as would be the case if Stoner had not been an officer and director of plaintiff. In the present case, however, the acts of defendants in misappropriating the Lektro-Vend and their use of it to compete

against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff.

"We are not confronted here with the situation in which a litigant attempts to interject on appeal a theory never advanced in the trial court. Plaintiff made its theory quite explicit in the trial on remand. It is a familiar principle, moreover, that when an appeal is taken the appellee may defend the judgment below on any ground appearing of record . . . We fail to see how defendants have suffered any prejudice from any supposed change in the theory on which plaintiff has presented its case."

(Pet. App. F 306-7)

Additionally the Supreme Court granted Vendo's motion to amend the pleadings to conform to the proof (Pet. App. F 307). Petitioners do not question here the power of the Illinois Supreme Court to grant such a motion.

II. The Illinois Anti-Trust Defense And Counterclaim.

Petitioners raised in their Fifth Separate Defense that the non-competition covenants contained in the 1959 contracts with Vendo were unlawful under the 1965 amendment to the Illinois Antitrust Act (Vol. I, A. 13).

In their First Counterclaim (Vol. I, A. 15-19) once amended (Vol. I, A. 39-40) Petitioners sought a permanent injunction and damages based upon alleged violations of the 1965 Illinois Antitrust Act by reason of the 1959 covenants and Vendo's efforts to enforce them.

The trial court ruled, and the Appellate Court agreed on the first appeal, that these pleadings ought to be stricken (Pet. App. B 294). The Appellate Court said the following with respect to those pleadings:

"By way of affirmative defense, it was alleged that the contracts sued upon violated the Illinois and Fed-

eral antitrust laws and were therefore invalid and unenforceable. Defendants also counterclaimed under the Illinois antitrust laws for treble damages . . . The 1965 Illinois antitrust law was held inapplicable for the additional reason that it had not been enacted until after execution of the agreements sued upon."

(Pet. App. B 294)

During the second trial Petitioners sought to reinstate their Illinois antitrust defenses and counterclaims, which was denied by the trial court and affirmed upon the second appeal by the Illinois Appellate Court, Second District, saying:

"In our opinion we affirmed the trial court's striking of these affirmative defenses and counterclaim bounded [sic] on alleged violation of Illinois antitrust laws. (*Vendo Co.* v. *Stoner*, 105 Ill. App. 2d at 298-299.) Subsequent to this court's prior opinion the Illinois legislature enacted section 7.9 amending the Illinois Antitrust Act, effective July 1, 1969 (Ill. Rev. Stat. 1969, ch. 38, sec. 60—7.9) to provide as follows:

'No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce.'

The Attorney General of Illinois, as *amicus curiae*, supports plaintiff's argument on this point.

"Even if it be assumed that the State legislature had the authority to enact this amendatory provision, we are unable to ascribe to it retroactive application to contracts entered into five years earlier. Our affirmance in the prior opinion of the trial court's dismissal of the State antitrust defense and counterclaim became the law of the case on remand. The trial court properly refused to allow reinstatement of the defense and counterclaim based on the amendment of the Illinois Antitrust Act."

(Pet. App. E 295)

These references to the facts of the Illinois antitrust defense and counterclaim were the only ones to appear in the Appellate Court opinions. Before the Illinois Supreme Court Petitioners implicitly accepted these facts when they affirmed that "the facts stated in the two opinions of the Appellate Court are substantially correct" (App. Br. 23. Docket No. 46228 in the Supreme Court of Illinois).

The Illinois Supreme Court addressed the same issue as follows:

> "At the original trial defendants raised as an affirmative defense and by way of counterclaim a charge that the sale agreement and the employment contract violated both the Illinois Antitrust Act . . . and the Federal antitrust laws. . . .
>
> "With respect to the State antitrust claim the appellate court on the first appeal affirmed the action of the trial court in striking the affirmative defense and counterclaim. On remand defendants unsuccessfully sought to reinstate their defense and counterclaim, and the appellate court again affirmed the judgment of the trial court in this respect. . . .
>
> "We prefer to dispose of this issue on another ground, namely that the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants."
>
> (Pet. App. F 309-310)

Petitioners' Federal antitrust defenses were voluntarily dismissed by them following the first trial.

ARGUMENT

I. By Petitioners' Own Admission The Alleged Constitutional Issues Have Neither Been Raised Properly Nor Decided By The Illinois Supreme Court.

Nine years of extensive litigation have seen this case before the Circuit Court of Kane County twice, the Illinois Appellate Court, Second District, twice and the Illinois Supreme Court once.

In the Illinois Supreme Court alone all briefs totaled more than 431 pages. Petitioners have been ably represented by experienced trial and appellate counsel. Yet Petitioners must admit on this record that these "serious" constitutional issues of due process of law were not raised in the State court until their Petition for Rehearing!

This belated appeal to the constitution comes too late. The general rule was framed in *Herndon* v. *Georgia*, 295 U.S. 441, 443, 79 L. Ed. 1530, 1532 (1935), to refuse consideration of issues brought forth for the first time on rehearing:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

A petition for writ was recently dismissed in *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L. Ed. 2d 398 (1969), for the reason that the questions were neither raised *nor* decided below.

Petitioners admit that *all* their federal issues were raised for the first time on Petition for Rehearing (Pet. 11). That

Petition was denied (Pet. App. H 1) without the Illinois Supreme Court deciding any of those questions. Petitioners well know that the Court would *not* decide them either, since the Illinois Supreme Court Rules limit the petition to those points "overlooked or misapprehended by the court." (110 A Ill. Stat. Ann. §367).

Petitioners rely on a narrow exception to the general rule utilized in *Saunders* v. *Shaw*, 244 U.S. 317, 61 L. Ed. 1163 (1917), that when the action of the state court could not have been *anticipated* by the aggrieved party, a Petition for Writ will lie. But this exception cannot apply here. The only thing that Petitioners did not anticipate was that they would lose the case in the Illinois Supreme Court. Each and every factual and legal issue raised by this Petition has been part of this case since its very inception:

(1) The breach of fiduciary duty

As early as the first trial Petitioners' attorneys acknowledged that fiduciary duties were involved. The Illinois Supreme Court correctly characterized Petitioners' insistence that the theory had changed as an "artificial analysis." (Pet. App. F 306)

(2) The measure of damages

Ever since the first Appellate Court opinion the parties have been arguing the theory of damages. That Court held that Vendo would be entitled to "the measure of lost profits to Vendo during the period of the breach, plus the diminution of its business at the end of the period covered by the covenants." (Pet. App. B 290). These were precisely the damages proved by Vendo and approved by the Illinois Supreme Court.

(3) The Illinois Antitrust Defenses and Counterclaim

The trial judge ruled in the very first trial that the 1965 Illinois Antitrust Act would not be retroactively

applied to the 1959 covenants. (Pet. App. B 294). This is exactly the ground upon which the Illinois Supreme Court ultimately affirmed that ruling (Pet. App. F 309-310).

Petitioners *never* emphasized their factual contention that the Counterclaim referred to post-1965 conduct (a contention we nevertheless dispute) but rather assured the Illinois Supreme Court that the facts contained in the Appellate Court opinions were "substantially correct." Neither of those opinions made reference to such conduct. The Illinois Supreme Court had a right to rely on those assurances.

The tactics and strategy of Petitioners are painfully apparent. They chose to rely on *State law* to argue *State issues* before the *State Court*. Since they failed to convince the State Court, they now for the first time elevate these State issues to constitutional proportions in order to retry this case yet another time.

These efforts are neither within the letter nor the spirit of the principles governing Petitions for Writs of Certiorari, and this Petition ought to be dismissed.

II. The Decision Of The Illinois Supreme Court Rests Upon Adequate Independent State Grounds.

Yet again by Petitioners' own admission, the Illinois Supreme Court did not decide any federal questions. Each and every ground upon which the decision is based is traditional and highly orthodox state law:

(1) cause of action for damages as a result of the breach of fiduciary duties by a corporate officer and director;

(2) damages measured by the extent of the provable loss;

(3) refusal to give retroactive effect to criminal statutes in the absence of a clear legislative mandate.

This Court recognizes that the existence of independent adequate state grounds in the opinion is sufficient reason to decline review. *Henry* v. *Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965).

For instance, Petitioners' Counterclaim was disposed of on the basis that the 1965 Illinois Antitrust Act would not be retroactively applied to invalidate 1959 contracts (Pet. App. F 310). On Petition for Rehearing Petitioners *misrepresented the Record* to the Illinois Supreme Court when they stated: "The Court does not consider the prospective operation of the law and *the validity of a counterclaim thereunder which sought damages for acts of the plaintiffs only from 1965 on. . . .*" (Pet. App. G 14).

No such limitations were contained in the pleadings. Petitioners alleged in paragraph 7 of their First Counterclaim that the 1959 contracts were "in unreasonable restraint of trade and commerce" (Vol. I, A. 18); paragraph 7 A alleged duress by Vendo in making "illegal demands" during the contract negotiations (Vol. I, A. 39); in their prayer for relief Petitioners requested the Court to decree "that the acts of Vendo as hereinabove described *have been and continue to be in violation of Section 3 of the Illinois Antitrust Act of 1965*" (Vol. I, A. 40). Petitioners then seek to cast their argument to this Court in terms of a Counterclaim dealing only with conduct "*after* the effective date of the 1965 Act." (Pet. 21).

Petitioners are thus forced to modify the Record in fairy tale fashion—what *might have been*—in order to persuade this Court that the Illinois Supreme Court acted arbitrarily in rendering its decision.

III. The Record In This Case Overwhelmingly Supports The Affirmance Of This Money Judgment By The Illinois Supreme Court.

The Abstract in this case alone is 1,225 pages in length. From the time of the first decision of the trial court award-

ing damages to the plaintiff, through both appeals to the Appellate Court and finally in the Illinois Supreme Court, it has been concluded after careful scrutiny of the Record that Vendo was entitled to an award of damages against Petitioners. The *only* issue upon which the Courts did not agree was that of the proper measure of damages.

Even if it *is* the province of this Court on certiorari to determine whether the State judgment is supported by the evidence (which we deny), we invite the Court to read the opinion of the Illinois Supreme Court (Pet. App. F), where that Court concluded:

> (1) "it is clear that Stoner violated his fiduciary duties to plaintiff" (Pet. App. F 303):
>
> (2) "Plaintiff was not . . . limited to the recovery of the profits which accrued to Lektro-Vend" (Pet. App. F 305):
>
> (3) "The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk" (Pet. App. F 305).

We nevertheless deny that this Court assumes the burden of reviewing all Records of money judgments for common law actions to determine whether findings are supported therein. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), and *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957), do not so hold. These cases involved the conduct of hearings to determine whether applicants to practice law were unconstitutionally denied their right to enter the legal profession. There is *no* requirement, on the other hand, for the United States Supreme Court to review the Record of a State Court proceeding to recover damages for wrongful conduct which is affirmed *entirely upon State grounds.*

If this Court were to countenance such principles for review the workload would swell to unmanageable proportions.

CONCLUSION

Throughout this entire litigation the Petitioners have been content to rest their case on what they conceived to be the applicable Illinois State law. They were wrong. The Illinois Supreme Court, in a carefully written and exhaustive opinion, dealt with and disposed of Petitioners' contentions as they were presented.

Petitioners now take these same contentions and urge this Court to find that due process issues are involved in the manner in which the State Court decided them. Due process does not entitle Petitioners to win. It entitles them to a full and fair hearing. The State Court provided such a hearing, on Petitioners' own terms. They cannot now complain. Respondent respectfully urges this Court to:

(1) Dismiss the Petition for lack of jurisdiction; or in the alternative

(2) Deny the Petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-897

HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware Corporation,

Petitioners,

vs.

THE VENDO COMPANY, a Missouri Corporation,

Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

May It Please The Court:

I.

Respondent's Statement Of The Case (Resp. Br. pp. 3-7) is inaccurate. From it one would conclude that from the beginning, the parties litigated a breach of a fiduciary duty

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Note: Italics ours unless otherwise noted herein.
Resp. Br. refers to Respondent's Brief.
Pet. refers to Petitioners' Petition.

by a director amounting to a diversion of a corporate opportunity. Thus Respondent speaks of "The Pleadings and Proof of Fiduciary Duty" (p. 3). To support its statement, Respondent refers to the argument of Petitioners' counsel on the Motion to Vacate on May 12, 1967, quoting words out of context (p. 3). The point of that argument was that "*the fiduciary duties of a director generally*" could not form the basis of liability; that "there is not a word in this complaint about 'fiduciary duties' and . . . this complaint is predicated solely upon the provisions of these two contracts" (A. 497); that it is essential that there be pleadings to support a judgment (A. 507-08); that Vendo "must recover upon the contract sued upon (a)nd the measure of defendants' liabilities must be based upon the alleged violations of that contract"; that "they can have it only the way they pleaded it" (A. 508) and that "suppose they wanted to amend, we'd want to re-plead, of course . . . ." (A. 512). The foregoing quoted words from that argument of Petitioners' counsel, Respondent omits.

Respondent did not amend its complaint (Pet. pp. 15, 16). Not only that, it ignored the Appellate Court's mandate with respect to the damages recoverable under the allegations of that complaint (Pet. pp. 16, 17). Quoting the Illinois Supreme Court (Resp. Br. pp. 4, 5) only makes it more evident that that Court equates a complaint alleging the breach of a covenant not to compete and damages resulting therefrom through the wrongful competition of a competitor, with the unpleaded breach of a fiduciary duty of a director amounting to the misappropriation of a corporate opportunity. We have mentioned the obvious differences in legal theories, issues, defenses and measure of damages between the two theories (Pet. pp. 19, 20).

And while, as the Supreme Court of Illinois says, "Plaintiff made its theory quite explicit in the trial on remand" (Resp. Br. p. 5), that Court does not mention that Petitioners consistently objected to evidence adduced on that theory (Pet. p. 8, fn.). Further, it would be novel doctrine indeed if "an appellee may defend a judgment below on any ground appearing of record" (Resp. Br. p. 5) if the result was, as here, a denial of procedural due process (Pet. pp. 17, 18).

As to the Supreme Court's granting "Vendo's motion to amend the pleadings to conform to the proof" (Resp. Br. p. 5), we pointed out on Petition for Rehearing that the proof did not support the amendment: that, given the opportunity, "we could easily have proved the falsity of" certain allegations in the amendment: and that there was evidence in the record contrary to the amendment (App. G 11, 12).

Respondent wrenches from context (Resp. Br. 4) the only reference to the word "fiduciary" in the more than thirty pages of the first Appellate Court opinion: ". . . such a breach of Stoner's fiduciary undertaking *as an employee* . . . requires a forfeiture of salary" (App. B 288). The "such a breach" obviously refers to "breach of the covenants not to compete," which is referred to in the immediately preceding sentence. The rest of the opinion deals solely with the validity of the covenants (App. A 281-85), the time period during which they were valid (App. A 285-86), whether defendants' activities were proscribed by the terms of the covenants (App. A 286-87), and the measure of damages "for the breach of a covenant not to compete" (App. A 287, 290), i.e., the damages caused by defendants' *"wrongful competition"* (App. A 291), obviously

through the instrumentality of Lektro-Vend Corp., as alleged in the complaint (Pet. 5).

We never argued to the Illinois Supreme Court that "a possible violation of due process was at issue" (Resp. Br. p. 4) because we had no reasonable basis to anticipate that that Court would countenance Respondent's blatant violation of the law of the case governing the retrial and then deny us a hearing on the revised liability and measure of damages. The critical part of the Illinois Supreme Court's opinion, which Respondent overlooks, states (App. F 306):

> "Defendants assert that the evidence introduced by plaintiff on the remand and the theory on which it was offered did not comport with the law of the case as established by the first opinion of the appellate court nor with the court's mandate. Plaintiff disputes defendants' interpretation of the first opinion of the appellate court. *We need not consider this point, however, since the doctrine of the law of the case is not applicable to this court in reviewing the judgment of the appellate court.*"

The point is that this ignores the fact that *the law of the case and mandate of the Appellate Court were binding upon the parties and the trial court upon the retrial!* Petitioners do not and cannot deny that a state supreme court is unfettered by the commands of its inferiors. But it cannot *retroactively* change the liability and measure of damages governing a trial without affording a party who was bound thereby a new trial on the factual and legal issues involved in such retroactive change.

Respondent's treatment of "The Illinois Antitrust Defense and Counterclaim" (Resp. Br. pp. 5-7) is also inaccurate. In characterizing Petitioners' counterclaim, Respondent refers only to "the 1959 covenants and Vendo's

efforts to enforce them" (Resp. Br. p. 5), completely ignoring that its efforts to enforce them commenced in August of 1965, *after* the effective date of the 1965 Illinois Antitrust Act, and ignoring completely the allegations in that counterclaim with respect to the acts committed by Respondent *after* the effective date of the 1965 Act in clear violation of its provisions (Pet. p. 21). The Appellate Court said, contrary to the counterclaim, that "nowhere have Defendants pleaded or argued that the commerce involved here is anything but interstate" (App. B 298). It then held that, because both parties' business was interstate, federal preemption applied (App. B 297, 298). This prompted the Illinois Attorney General to file *amicus* briefs in the Illinois Supreme Court and the Appellate Court, wherein he urged that the result of the decision would be to frustrate his ability to enforce the Illinois Antitrust Act against companies doing business in interstate commerce (See Pet. 14).

Thus, Respondent's references were hardly "the only ones to appear in the Appellate Court opinions" (Resp. Br. p. 7). The fact that certain critical allegations of the defenses and counterclaim were not repeated in these court opinions, which we suggested were "substantially correct" (Resp. Br. p. 7), does not refute that those allegations were clearly pleaded, nor that Petitioners were denied a trial upon alleged acts which occurred after the effective date of the 1965 Illinois Antitrust Act!

II.

Respondent argues that "By Petitioners' own admission, the alleged constitutional issues have neither been raised properly nor decided by the Illinois Supreme Court" (Resp. Br. pp. 8-10). Respondent's assertion that no "constitu-

tional issues of due process of law were . . . raised in the State court until [Petitioners'] Petition for Rehearing" (Resp. Br. p. 8), is belied by the footnote on page 12 of our Petition here that "Petitioners argued throughout that because the trial court held it had no jurisdiction to hear their claims because of Article VI (preemption) they were denied substantive due process because those claims involving only intrastate commerce had not been heard on their merits." We raised this federal constitutional claim in the Illinois Supreme Court and pointed out on Petition for Rehearing that we had done so (App. G 33). The Illinois Supreme Court skirted the issue, holding that the State Antitrust Act could not be applied retroactively, certainly an adjudication Petitioners were not bound to anticipate, in view of hornbook law to the contrary (Pet. 21-23). Nor were we bound to anticipate that the Supreme Court would retroactively change the law of the case which governed the trial without affording Petitioners an opportunity to be heard upon the new issues upon which the judgment for liability and damage was entered. This has been settled Illinois practice and "federal fundamental requirement of due process" (Pet. p. 17 and footnote).

III.

As to the decision of the Illinois Supreme Court resting upon independent state grounds (Resp. Br. 10, 11), no state court decision which denies due process and is arbitrary and capricious can be justified on "adequate independent state grounds."

Nor did Petitioners misrepresent the record to the Illinois Supreme Court (Resp. Br. 11). The counterclaim "sought damages for acts of the plaintiff only from 1965 on"

(App. G 14). Obviously, the allegations of paragraph 7a of the counterclaim to which Respondent refers (Resp. Br. 11) are laid by way of inducement to show the anti-competitive character of the contract Respondent was seeking to enforce, in violation of the 1965 Act. Further, if any part of the counterclaim states a cause of action, it is not subject to being stricken and relief denied for acts performed after the 1965 Act and patently in violation of the criminal provisions of that Act. If this is modifying the record "in fairy tale fashion" (Resp. Br. 11), then corporations with contracts having a congenital infirmity executed prior to the 1965 Act (Pet. 22) are immune from the criminal provisions and treble damage provisions of the 1965 Act for *all acts* committed by them after passage of that Act.

IV.

Respondent never comes to grips with our contention that the record upon which the Illinois Supreme Court affirmed the $7,345,500 damages award did not rationally justify that result. Rather, Respondent merely asserts that the judgment finds "overwhelming" support in the record, and "invites" this Court to "read the opinion of the Illinois Supreme Court" (Resp. Br. pp. 11-12). Nowhere does Respondent challenge the facts we stated and argued (Pet. 23-30).

Mere reading of that opinion sidesteps the point, which is that the *evidence* does not support it. The basic rationale of that opinion is that, had Stoner disclosed his interest in the Lektro-Vend Machine, Vendo may have dealt with Phillips "directly or through some other agent" and that the Court "cannot say that Vendo would have declined an of-

fer to purchase the Lektro-Vend or to seek to develop such a machine itself, had a genuine offer to do so been extended to it" (App. F 306). We described this "as pure speculation and conjecture," which indeed it is (Pet. 25, 26). We failed to mention that, when Stoner received the letter (PX 31) from Childers (Vendo's President) of April 9, 1963, making a counter-offer to purchase the Lektro-Vend, he, Stoner, called Childers back ". . . *to ask if he had a specific figure in mind that he wanted me to talk to Rod Phillips about*" and that Childers said, "*No, we just can't see any market for it. It's too expensive a machine*" (Vol. II, A. 1152). Childers did not deny that testimony. He was not even a witness at that trial. This testimony further confirms "the plain unvarnished facts" (Pet. 26, 27).*

Respondent's attempt to distinguish two of the three cases we cited falls short (Resp. Br. 12). The *principle* enunciated in *Schware* and *Konigsberg,* not to mention *Thompson* (Pet. p. 24), cannot be limited to any class of cases, but applies whenever findings are wholly devoid of rational evidence to support them. Many other cases from this Court support that doctrine. It is no answer to say that the judgment here was affirmed "entirely upon state grounds" (Resp. Br. 12). It is not the facade of the opinion sustaining the state court judgment, but the reality of the record that governs federal review to secure federally protected rights of due process (Pet. 17, 18, 22, 23).

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* We could have offered other evidence had we known we were in a trial involving the misappropriation of a corporate opportunity (Pet. 19, 20).

CONCLUSION

We too are aware of "the work load" of this Court (Resp. Br. 12). We are not urging "this Court to consider constitutional issues raised as an *afterthought* . . . ." (Resp. Br. 2).

Rather, we respectfully submit that the Petition raises serious constitutional questions going to the very heart of the judicial process, involving elemental principles in the administration of civil justice. Therefore, we again pray the Petition be granted for the reasons stated therein.

Respectfully submitted,

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